IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ONE PARCEL OF REAL PROPERTY KNOWN AS: E/2 NW/4 SE/4 AND W/2 NE/4 SE/4 (40.0 ACRES) and ONE PARCEL OF REAL PROPERTY KNOWN AS: E/2 W/2 NW/4 SE/4 (10.0 ACRES) ALL IN SECTION 29, TOWNSHIP 18 NORTH, RANGE 10 EAST, CREEK COUNTY, OKLAHOMA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, Defendants.	)	Case No. 92-C-037-E

FILED
JAN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JAN 17 1997

ORDER

Now before the Court is the Motion to Stay Judgment of Forfeiture (Docket #50) of the Claimant Melvin Gann.

In this forfeiture case, the government sought, and was granted summary judgment on May 23, 1996. Before the Court could enter a judgment of forfeiture, the parties asked that the Court stay this matter pending a decision of the Supreme Court on an applicable issue. The Court stayed

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the matter, and the Supreme Court has now rendered its decision in United States v. Ursery, 116 S.Ct. 2135 (1996) holding that civil in rem forfeiture is not punitive in nature and does not constitute punishment for Double Jeopardy Clause purposes. Accordingly, this Court entered a Judgment of Forfeiture on December 31, 1996.

Gann now seeks to stay the Judgment of Forfeiture, asserting that there "remains at issue additional assets which the Government seeks to forfeit herein." Gann's assertion is without merit. The matter at issue in this case, described by the Complaint for Forfeiture In Rem, and the Amended Complaint for Forfeiture In Rem, is the forfeiture of certain parcels of property only. Therefore there is no grounds for staying the Judgment of Forfeiture as requested by Gann.

The Motion to Stay Judgment of Forfeiture (Docket #50) is denied.

IT IS SO ORDERED THIS 16th DAY OF JANUARY, 1997.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED
JAN 17 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER EDWARD KOSTICH JR.,

Plaintiff,

vs.

MICKEY WILSON, *et al.*,

Defendants.

Case No. 96-CV-1170-B

ENTERED ON DOCKET
DATE JAN 17 1997

ORDER

Before the Court for consideration is Defendant Elam J. Raymond's motion for more definite statement and motion for summary judgment (Docket # 7), Defendant Given Adams' motion to dismiss for lack of jurisdiction (Docket # 8), Defendant Gregory Frizzell's motion to dismiss (Docket # 10). After a careful review of the record and applicable legal authorities, the Court concludes the above-referenced motions should be **GRANTED**, each pursuant to Fed.R.Civ.P. 12 (b)(6). Further, the Court is of the opinion the action, in its entirety, should be **DISMISSED WITH PREJUDICE**.

Discussion

This is a typical tax protester action brought *pro se* by Walter Kostich. In an effort to relieve himself of certain financial obligations, Kostich filed a voluntary petition for Chapter 13 bankruptcy in the Bankruptcy Court for the Northern District of Oklahoma on December 22, 1995. On March 27, 1996, that case was dismissed by Judge Tom Cornish. On May 7, 1996, Kostich filed another voluntary petition in bankruptcy. That case was ultimately dismissed on December 19, 1996, one day after Kostich failed to meet the Court ordered deadline to file certain tax returns. On December 18, 1996, Kostich filed the instant "Complaint" seeking $35,000,000.00 in "suing damages" from 18 defendants, 17 of which are Federal or State employees. Kostich's "Complaint" contains the typical

(17)

gibberish found in tax protester suits.

As to the merits of Defendants' Raymond, Adams, and Frizzell motions, the Court finds Kostich has failed to state a claim for which relief can be granted. Accordingly, the Court hereby **GRANTS** the instant motions pursuant to Fed.R.Civ.P. 12 (b)(6).[1] As to the moving Defendants, Raymond, Adams, and Frizzell, the case is **DISMISSED WITH PREJUDICE**.

Further, the Court *sua sponte* **DISMISSES WITH PREJUDICE** the remainder of Kostich's "Complaint" against all remaining Defendants for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12 (b)(6).

The Court finds Kostich's "Complaint" incomprehensible, frivolous, barren of facts, and vexatious. Accordingly, **COSTS AND ATTORNEY FEES** of this action are assessed against Kostich and in favor of each Defendant upon proper application filed on or before January 31, 1997. *See* N.D. LR 54.1, 54.2.

IT IS SO ORDERED this 17th day of January, 1997.

for THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1]While the Court need not reach the issue of qualified immunity and/or Eleventh Amendment bar to suit, there is serious question concerning the viability of any suit brought against the named Governmental employees. *See* Will v. Michigan Department of State Police, et al., 491 U.S. 59, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988).

ENTERED ON DOCKET
DATE 1-17-97

(1-563)

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA THOMAS, surviving widow of HAROLD THOMAS, Deceased,

Plaintiff,

v.

MARS B. GONZAGA, M.D.,

Defendant.

Case No. 95-C-1046K

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Linda Thomas, and dismisses this cause with prejudice to the right to the bringing of any other future action.

Michael S. Ryan, OBA #14126
Attorney for Plaintiff
EDMONDS COLE HARGRAVE
GIVENS & WITZKE
One North Hudson, Ste. 200
Oklahoma City, OK 73102
(405) 272-0322

Malinda S. Matlock, OBA #14108
Attorney for Defendant
100 W. 5th St., Ste. 808
Tulsa, OK 74103-4225

ENTERED ON DOCKET
DATE 1-17-97

(1-563)

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA THOMAS, surviving widow of HAROLD THOMAS, Deceased,

Plaintiff,

v.

MARS B. GONZAGA, M.D.,

Defendant.

Case No. 95-C-1046K

RELEASE AND SATISFACTION OF JUDGMENT

The undersigned do hereby acknowledge receipt from Mars B. Gonzaga, M.D., Defendant in the above-titled cause of $46,855.18 in satisfaction of the judgment rendered in the above cause on the 9th of October, 1996, in favor of the Plaintiffs herein and against the Defendant which said sum is received and accepted in full payment and satisfaction of said judgment, with interest and costs and in full payment and satisfaction of any and all attorneys' fees, liens, and claims in said cause and in and to the proceeds of said judgment and the undersigned do hereby release, acquit and forever discharge the said Defendant, Mars B. Gonzaga, M.D., of and from all liability to and demand of the undersigned in respect to said cause and judgment.

The parties additionally agree, as a condition of this agreement, to retain the responsibility and obligation to pay their own expert's fees and expenses incurred in this case. The Defendant further agrees to waive their costs awarded by the court in this matter.

This release shall be filed in the office of the clerk of said court and said clerk is hereby authorized and directed to enter said release on the judgment docket of said court and to release said judgment of record.

Dated this ____ day of _____, 1997.

Linda Thomas

Linda Thomas, Plaintiff

Michael S. Ryan, Attorney for Plaintiff
EDMONDS COLE HARGRAVE
GIVENS & WITZKE
One North Hudson, Ste. 200
Oklahoma City, OK 73102
(405) 272-0322

Malinda S. Matlock, Attorney for Defendant
BEST SHARP HOLDEN BEST SULLIVAN
& KEMPFERT
808 ONEOK
100 West 5th Street
Tulsa, OK 74103
(918)582-1234

ENTERED ON DOCKET
DATE 1-17-97

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ASBESTOS HANDLERS, INC.,

Plaintiff,

vs.

DOUGLAS EDWARD MOORE, VINCE STEVEN WAYHAN, and ROBERT WAYNE EMERSON,

Defendants.

Case No. 96-C-726-K

FILED
JAN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Plaintiff filed a Complaint on August 9, 1996, requesting damages against the Defendants. Defendants did not file an answer, and on October 9, 1996, a default against the Defendants was entered. Plaintiff filed an Application to set Motion for Default Judgment for Hearing on November 19, 1996. Plaintiff noted that the damages requested by Plaintiff, although in excess of $50,000.00, were unliquidated and therefore a hearing was necessary to determine the amount of damages. The District Court referred the matter to the undersigned United States Magistrate Judge by minute order dated November 19, 1996.

On January 9, 1997, an evidentiary hearing to determine the amount of damages sustained by Plaintiff was held. Plaintiff appeared by and through its counsel of record David L. Kearney. Defendants did not appear either in person or through counsel. Based on the evidence presented by Plaintiffs, a review of the exhibits and

briefs filed by Plaintiff, and a review the case file, the Court makes the following findings and recommendations to the District Court.

PROPOSED FINDINGS OF FACT

1. Plaintiff is a citizen of Oklahoma. Defendants are citizens of Texas.

2. Defendants Douglas E. Moore, Vince S. Wayhan, and Robert W. Emerson were properly served with a Summons and Complaint by private process server on August 24, 1996, August 24, 1996, and August 17, 1996, respectively.

3. Each of the Defendants failed to answer or otherwise respond to the Summons and Complaint.

4. On October 19, 1996, the Court Clerk for the United States District Court for the Northern District of Oklahoma entered a default against the Defendants in this action.

5. Defendants were employed by Plaintiff, and Plaintiff paid each of Defendants a salary for three months during a period of time when Defendants performed no work for Plaintiff's company. Plaintiff incurred actual damages of $22,686.71.

6. Plaintiff was required to recreate computer disc estimates for at least 37 projects which Defendants had handled while employed by Plaintiff. Plaintiff was required to recreate the computer disc estimates because Defendants improperly took the computer discs for the projects when Defendants left Plaintiff's employment. Plaintiff incurred actual damages of $33,115.00.

7. Plaintiff was required to reconstruct numerous "job files" to maintain compliance with federal OSHA requirements because Defendants improperly took such job files when Defendants left Plaintiff's employment. Plaintiff incurred actual damages in the amount of $6,547.20.

8. Defendants took several policy books, safety, and environmental manuals, which were the property of Plaintiff, when Defendants left the employment of Plaintiff. Plaintiff sustained actual damages of $36,691.80, which is the actual cost of the materials taken.

9. While employed by Plaintiff, Defendants improperly used Plaintiff's equipment to design letterhead, logos and business cards. Plaintiff sustained actual damages in the amount of $1,000.00.

10. Plaintiff sustained actual damages, due to the improper actions of Defendants, in the amount of $200.00 for amounts paid to Irasema Emerson for graphics.

11. Prior to resigning, Defendants printed a customer list from Plaintiff's computer, which Defendants improperly took with them after leaving the employment of Plaintiff. Plaintiff was damaged in the amount of $25,000.00.

12. Defendants improperly falsified documents with respect to a bid for a job for Texaco. Plaintiff incurred actual damages in the amount of $3,500.00 to redo and construct the bid.

13. Plaintiff suffered actual damages in the amount of $113,061.74 due to Defendants' improper actions and falsified bids submitted with respect to a Shell Oil project.

14. Defendants unauthorized use of Plaintiff's telephone resulted in damages to Plaintiff of $350.00.

15. Defendants were reimbursed for various expenses which were unauthorized and improperly submitted to Plaintiff for payment. Plaintiff suffered actual damages of $558.66.

16. Plaintiff incurred actual damages of $4,280.00 in re-bidding Texaco project #5544 due to the improper actions of Defendants.

17. Defendants improperly took numerous office supplies from Plaintiff, and Plaintiff incurred damages of $1,500.00.

18. Defendants' conduct and actions with respect to Plaintiff were willful and malicious and Plaintiff is entitled to punitive damages.

19. Defendants intentionally misrepresented numerous facts to several potential and current customers of Plaintiff and slandered Plaintiff.

PROPOSED CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because complete diversity of citizenship exists between the parties and the amount in controversy exceeds $50,000.00, exclusive of interest and costs.

2. The Court has personal jurisdiction over the Defendants.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a).

4. Defendants have defaulted due to their failure to file an answer or otherwise respond to Plaintiff's Complaint.

5. Pursuant to Fed. R. Civ. P. 55, and the prior entry of default by the Court Clerk of the Northern District, Plaintiff is entitled to an entry of Default Judgment against the Defendants.

6. Texas law governs the determination of Plaintiff's cause of action. The actions of which Plaintiff complains occurred in Texas, the Defendants were employed by Plaintiff to work in Texas, the contracts and projects with which Defendants interfered were located in Texas. Restatement (Second) of Conflict of Laws §§ 145, 188.

7. Asbestos Handlers, Inc. has sustained actual damages from the conduct of the Defendants in the amount of $248,491.11. Separate and in addition to the actual damages sustained by Plaintiff, Plaintiff was damaged by Defendants' slander of Plaintiff, and should be awarded $50,000.00 in damages.

8. The conduct of the Defendants was willful and malicious and justifies the award of punitive damages in the amount of $50,000.00. Texas Civil Practice and Remedies, § 41.003 (1996).

9. The conduct of Defendants is continuing and Plaintiff Asbestos Handlers, Inc. has no adequate remedy at law. Therefore Plaintiff Asbestos Handlers, Inc. should be enjoined from making further slanderous statements about Asbestos Handlers, Inc. and from committing any further acts of unfair competition and deceptive trade practices.

10. The conduct of Defendants was done in concert and in furtherance of a civil conspiracy thus making Defendants jointly and severally liable to Plaintiff, Asbestos Handlers, Inc. for all monetary damages.

RECOMMENDATION

The undersigned Magistrate Judge recommends that the District Court enter default judgment in favor of Plaintiff and against Defendants on all claims. The undersigned recommends that the judgment award Plaintiff $298,491.11 actual damages, $50,000.00 for damages related to slander, and $50,000.00 for punitive damages, for a total award in favor of Plaintiff of $398,491.11 in damages against Defendants. In addition, Defendants should be enjoined from making any further slanderous statements against Asbestos Handlers, Inc., and from committing any further acts of unfair competition and deceptive trade practices.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 16 day of January 1997.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JASON MURRAY,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-481-W

ENTERED ON DOCKET

DATE 1/17/97

JUDGMENT

Judgment is entered in favor of the defendant, Shirley S. Chater, Commissioner of Social Security, in accordance with this court's Order filed December 30, 1996.

Dated this 15th day of January, 1997.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNIVERSAL SHOWCASE, INC., a corporation,

Plaintiff,

vs.

Case No. 95-C-534-W

OKLAHOMA FIXTURE COMPANY, a corporation,

Defendant.

ENTERED ON DOCKET
DATE 1/17/97

JUDGMENT

Judgment is hereby entered in favor of the Plaintiff, Universal Showcase, Inc., and against the Defendant, Oklahoma Fixture Company, in the principal sum of $141,332.87, pre-judgment interest thereon from June 14, 1995, to the date of the entry of this judgment, post-judgment interest thereon from the date of entry of this judgment, and costs of this action, accrued and accruing, including a reasonable attorney's fee to be later set by the court.

Judgment is further entered in favor of Plaintiff, Universal Showcase, Inc., on the counterclaim of Defendant, Oklahoma Fixture Company.

IT IS SO ORDERED.

Dated this 15th day of January, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 1-17-97

WALTER CHARLES SMITH,

Plaintiff,

vs.

TULSA COUNTY JAIL, SATAYABAMA C. JOHNSON, RON ISAAC,

Defendants.

No. 96-CV-549-K

FILED
JAN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging violation of his Eighth Amendment rights. Defendants Johnson and Isaac have moved for summary judgment. Defendant Glanz has moved to dismiss, or in the alternative, for summary judgment on the basis of the court-ordered Martinez report ["Sp.R."]. Plaintiff has objected to both motions and asserted a cross-motion for summary judgment. For the reasons stated below, the Court concludes Defendants' motions should be granted, and Plaintiff's motion for summary judgment denied.

I. BACKGROUND

Plaintiff Walter Charles Smith ["Smith"] was a pretrial detainee in the Tulsa City/County Jail from February 21, 1996 until November 5, 1996. He alleges that while incarcerated he contracted "an unidentified fungus" for which he made numerous requests for medical treatment. According to Plaintiff, these requests were ignored by the "Medical Department" in violation of his

constitutional rights. Smith alleges in Count I that Dr. Johnson and her medical staff have committed medical malpractice by deliberately depriving him "of serious medical needs" under "state tort law and as proscribed by the Eighth Amendment." [*Complaint*, Doc. #1.] Plaintiff claims Defendant Isaac failed to properly supervise and provide specified treatment. Under Count II, Plaintiff alleges indifference to his medical needs by the staff and detention officers of the Tulsa County Jail. Smith seeks $250,000 in compensatory damages as well as punitive damages and demands dismissal of the named defendants.

On August 22, 1996, Defendants Dr. Satayabama Johnson, a contract physician who provides health care services to Tulsa City/County Jail, and Ron Isaac, who is administrator of the medical services, moved to dismiss this action against these defendants on the ground that Plaintiff had failed to respond to their motion for summary judgment. However, the Court determined Plaintiff had filed a response on August 12, 1996, but had not complied with Fed.R.Civ.P. 5 "to include a certificate of service." Plaintiff was cautioned to comply with the Federal Rules of Civil Procedure, and the Court denied Defendants' motion to dismiss. Plaintiff's objection to Defendants' motion for summary judgment was reasserted on August 27, 1996.

Then on November 7, 1996, Defendant Stanley Glanz ["Glanz"] filed a motion to dismiss on the basis of frivolousness, or in the alternative, for judgment as a matter of law. Plaintiff objected, alleging inadequate medical care, and raised his cross-motion for

summary judgment.[1]

II. SPECIAL REPORT

An initial medical screening was completed and signed by Plaintiff on February 21, 1996. A review of Plaintiff's previous medical records revealed a history of treatment commonly associated with athletes foot and rashes. (Sp.R. at 14.) Having refused the initial inoculations and physical, Plaintiff made his first health request on February 26, 1996, requesting "something stronger" than the antifungal powder for his foot problem. Plaintiff has submitted a total of 62 medical requests from February 26, 1996 until October 2, 1996. [Sp.R. at 4.] Of these 62 requests, six contain notations that Plaintiff was seen or treated by Dr. Johnson the day of the request or a few days prior to the request. Only two request forms reflect no written action. [Sp.R. at 4-12.] Plaintiff had a total of 48 entries in the progress notes; 16 made by Dr. Johnson, indicating Plaintiff was either seen or his treatment reviewed. Plaintiff received a blood culture test on June 25, 1996, showing a diagnosis of staphylococcus aureus. Johnson submitted an affidavit, attesting that he had treated and secured outside medical treatment for Plaintiff. (Sp.R. at Ex. E.) On four occasions Plaintiff was referred to another physician for treatment: 07/09/96, 07/30/96, 08/01/96, and 09/03/96. According

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[1]The Court does not address the claims Plaintiff alleges for the first time in his response and cross-motion for summary judgment regarding "inadequate communications," "denial of quarantine," "denial of post-treatment" for the reason Plaintiff has failed to plead those claims in his *Complaint*.

to the medication administration records, Plaintiff was treated with foot powder, antifungal creams, foot soaks, and oral antibiotics for the relevant period.

Although there were 31 recorded refusals by Plaintiff to participate in the inmate exercise program, there is no reference to the reason for the missed periods. A review of the Prisoner Grievance Forms did not reveal any reference to the fungus or that it interfered with Plaintiff's exercising or conducting himself in a normal manner. (Sp.R. at 15-16.) Plaintiff submitted 9 grievances, 7 of which were medically related, and 1 letter, claiming his present condition arises indirectly from the Adult Detention Center location "namely A-Pod's top shower." He also requested another blood test.(Sp.R. at 18 and Ex. M.) On August 13, 1996, another blood test was administered, and on August 27, 1996, Smith was referred to Dr. Nahmias, a podiatrist, for follow-up treatment of this chronic fungal condition. Plaintiff continued to submit health service requests, complaining of inadequate medical treatment, on 8/28/96; 8/30/86; 9/1/96; and 9/2/96. Smith was seen by a specialist again on September 2, 1996. Between September 6, 1996 to October 2, 1996, Plaintiff made 8 more requests for medication to treat the itching and burning of his feet and ankles. Notations by the medical staff indicate Plaintiff was receiving the prescribed medication as ordered. On September 18, 1996, the nurse noted that a renewal tube of the prescribed medication was given to Plaintiff. Progress notes on September 28, 1996, indicate the plan of care for Plaintiff: "refer inmate to

physician, get new order for Lamosil cream." The September 30, 1996 notation indicates cream was obtained and to be given twice daily for two weeks. [Sp.R. at Ex.D.]

III. ANALYSIS

A. Dismissal as Frivolous.

Defendant Glanz has raised frivolousness as a basis for dismissal pursuant to 28 U.S.C. § 1915(d). "The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1006, 1008 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Hall, 935 F.2d at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(d). Id.

B. Dismissal for Failure to State a Claim.

When reviewing a pro se complaint, as in this case, the Court must employ standards less stringent than if the complaint had been drafted by counsel. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, in order to withstand a motion to dismiss, a plaintiff

must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts and requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993). If plaintiff's complaint demonstrates both substantive elements, it is sufficient to state a claim under § 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

First, the Court takes notice that Plaintiff is a pretrial detainee during the events at issue. As such, he is not entitled to relief under the Eighth Amendment. It is the Fourteenth Amendment Due Process Clause which protects a pretrial detainee, such as plaintiff, against cruel and unusual punishment. See Bell v. Wolfish, 441 U.S. 520 (1979). Accordingly, Plaintiff's Eighth Amendment claims must be dismissed for failure to state a claim. Therefore, in accordance with Plaintiff's pro se status, the Court liberally construes Plaintiff's *Complaint* as a claim for relief under the Fourteenth Amendment, which will be addressed more fully below.

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claims which would entitle him to

relief. The Court notes that Sheriff Stanley Glanz is neither named in the caption or Part A of the *Complaint*, although it appears the summons was served by the U.S. Marshals Service upon a representative of the Tulsa County Jail.[2]

In the context of civil rights claims against government officials, it is a well-established principle that a defendant may not be held individually liable under § 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 590 (10th Cir. 1991). To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates; at a minimum, the plaintiff must allege knowledge or "deliberate indifference" to the subordinates' actions. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Meade, 842 F.2d at 1527-28.

In the instant case, Defendant Glanz will be held individually liable only if, by his own conduct, he deprived the Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). After liberally reviewing Plaintiff's *Complaint*, the Court finds that the Plaintiff can state no set of facts in support of his claim that Defendant

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[2]The U.S. Marshal Office served summons and Form USM-285 directed to "Tulsa Co. Jail, et al., 500 S. Denver, Tulsa, Oklahoma 74103," upon "Sheryl Cato" on July 18, 1996.

Glanz, by his own conduct, caused or participated in any alleged constitutional violations. Even construing the Plaintiff's *Complaint* liberally in accordance with his pro se status, the Court concludes that Plaintiff has failed to allege an affirmative link sufficient to establish the individual liability of Defendant Glanz. Accordingly, Defendant Glanz is entitled to dismissal of any claim Plaintiff may have against Glanz in his individual capacity.

Furthermore, Plaintiff has also failed to state a claim against Defendant Glanz in his official capacity as Sheriff of Tulsa County. Claims against a government officer in his official capacity are actually claims against the government entity for which the officer works. Kentucky v. Graham, 473 U.S. 159, 167 (1985). In order to state a claim against a municipality under § 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978); Meade, 841 F.2d at 1529. There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Plaintiff has failed to allege a custom or policy of deliberate indifference toward pretrial detainees at the jail, or that an unconstitutional policy exists attributable to a municipal policy maker. Plaintiff's showing is insufficient to progress past the

pleading stage. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985).

After liberally construing the allegations in the *Complaint* in the light most favorable to Plaintiff, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege a custom or policy of deliberate indifference toward pretrial detainees at the jail. Nor has Plaintiff alleged that Tulsa County was grossly negligent in failing to train and supervise Tulsa County Jail officials. Taking the facts pled in the *Complaint*, as well as Plaintiff's allegations in his response and cross-motion as true, Plaintiff has not alleged an unconstitutional policy attributable to a municipal policy maker, sufficient to progress past the pleading stage. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (plurality opinion) (single incident of unconstitutional activity not sufficient for municipal liability unless incident includes proof that it was caused by existing unconstitutional policy attributable to municipal policy maker).

The Court also grants Defendant Glanz' motion to dismiss Plaintiff's prayer for punitive damages. Because Plaintiff's claims against Defendant Glanz in his official capacity are actually claims against the County of Tulsa, punitive damages cannot be awarded. It is well established that a municipality is not liable for punitive damages in a proceeding under 42 U.S.C. § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981); Butcher v. City of McAlester, 956 F.2d 973, 976 n.1 (10th

Cir. 1992); Wulf v. City of Wichita, 883 F.2d 842, 855 n.19 (10th Cir. 1989).

C. Summary Judgment

1. Standard

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgement. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The court may treat the Martinez report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. See Hall v. Bellmon, 935 F.2d 1106, 1111

(10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. Id. at 1109. The court must also construe the plaintiff's pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

In considering Defendants' motion for summary judgment, the Court has examined the special report. Although Plaintiff has responded to the motions, he has presented no evidence to refute the facts in Defendants' motion and the special report. Plaintiff's response and cross-motion for summary judgment with various newspaper articles attached, merely contain conclusory allegations that the special report is inadequate and erroneous, do not controvert Defendants' summary judgment evidence, and do not comply with the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 56; also Anderson, 477 U.S. at 250. Therefore, because Plaintiff has not presented conflicting evidence, the Court accepts the factual findings of the special report. See Hall, 935 F.2d at 1111.

2. Medical Treatment

As stated previously, under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted

inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). However, the standard and requisite components are the same: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). With regard to the subjective component, "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent . . . diagnos[is]' simply fail to establish the requisite culpable state of mind." Id. at 2323; see also El'Amin v. Pearce, 750 F.2d 829, 832-33 (10th Cir. 1984).

After carefully reviewing the record in this case, the Court concludes that Plaintiff has failed to make any showing that the Defendants possessed the requisite culpable state of mind or that Plaintiff's medical needs were of sufficiency or seriousness to meet the objective standard. Plaintiff was treated on numerous occasions and with a variety of medications. At most, Plaintiff differs with the medical judgment of the Dr. Johnson in that Plaintiff thinks he should have received different medication or treatment. It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Olson v. Stott, 9 F.3d 1475, 1477 (10th Cir. 1993) (difference of opinion regarding delay in elective surgery did not support inadequate-medical-care claim under Eighth Amendment) (citing Ramos v. Lamm, 639 F.2d 559,

575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)).

Assuming Plaintiff's allegations are true that Defendants Johnson and Isaac intentionally delayed medical treatment, "'delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm.'" Olson, 9 F.3d at 1477 (quoting Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993). Plaintiff has not shown that Defendants' delay has resulted in substantial harm to him.

Additionally, Plaintiff's allegation that Dr. Johnson or Mr. Isaac were negligent in responding to his foot fungus condition does not amount to an Eighth/Fourteenth Amendment violation. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth [Fourteenth] Amendment. Estelle, 429 U.S. at 104-05.

V. CONCLUSION

After liberally construing Plaintiff's *Complaint*, the Court concludes that Defendant Glanz' motion to dismiss for failure to state a claim should be granted. As to Plaintiff's Fourteenth Amendment Due Process claim, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motions for summary judgment [docket #4 and #14] are **granted**, and Plaintiff's cross-motion for summary judgment [docket #17] is **denied**. Also Defendants' motion for attorney fees [docket #14] is **denied**.

SO ORDERED THIS 15th day of January, 1997.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

FILED
JAN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER CHARLES SMITH,

Plaintiff,

vs.

TULSA COUNTY JAIL, SATAYABAMA C. JOHNSON, RON ISAAC,

Defendants.

No. 96-CV-549-K

ENTERED ON DOCKET
DATE 1-17-97

J U D G M E N T

This matter came before the Court for consideration of the motions for summary judgment by Defendants and that of Plaintiff. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants, Dr. Satayabama C. Johnson, Ron Isaac and Stanley Glanz, and against the Plaintiff.

ORDERED THIS DAY OF 15th JANUARY, 1997.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 14 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KAREN LEA HART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

Case No.96-CV-1158-H

ENTERED ON DOCKET
DATE JAN 16 1997

FILED
JAN 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MAGISTRATE'S REPORT AND RECOMMENDATION

Karen Lea Hart, a detainee in the Cleveland County Detention Center, has filed a pro se "Motion for Habeas Corpus." She represents that: she was arrested on October 27, 1996 by the Oklahoma Highway Patrol in Wagoner County, Oklahoma; she was indicted by a federal grand jury in Tulsa Oklahoma on November 8, 1996; and although she has been in custody since October 27, 1996, she has not appeared before a United States Magistrate Judge for arraignment or a "determination of bond issues." [Dkt. 1, p. 2].

Pre-trial petitions such this are properly brought under 28 U.S.C. § 2241(c)(3), which applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against the petitioner. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 503-04, 93 S.Ct. 1123, 1133-34, 35 (1973) (Rehnquist, J. dissenting); *Capps v. Sullivan*, 13 F.3d 350 (10th Cir. 1993). Accordingly, the Court construes the present "Motion for Habeas Corpus" as a petition brought under 28 U.S.C. § 2241(c)(3) for pre-trial habeas relief.

The Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") grant the court the discretion to apply the Habeas Rules to applications for habeas corpus not covered under 28 U.S.C. § 2254. Habeas Rule 1(b). The Court exercises that discretion and will apply the Habeas Rules to the instant petition.

Habeas Rule 4 provides:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. **If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.** Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved. [emphasis supplied].

Although Petitioner complains that she has not been arraigned or had bond issues determined by a United States Magistrate Judge, she does not allege that she is in custody pursuant to arrest on the federal indictment; that her incarceration has been extended by reason of the federal charges; or any other circumstance that might entitle her to relief. *See e.g. Bloomgren v. Belaski*, 948 F.2d 688 (10th Cir. 1991).

The fact of indictment does not trigger the right to appear before a United States Magistrate Judge. That right is triggered by an arrest on the indictment. *See* Fed.R.Crim.P. 5 and 9; *United States v. Ireland*, 456 F.2d 74 (10th Cir. 1972)

(Federal rule requiring that defendant be taken before a magistrate judge within a reasonable time cannot be violated until the accused is taken into federal custody). No arrest is alleged. It appears, therefore, that petitioner is not entitled to relief in the district court.

Accordingly, the undersigned United States Magistrate Judge RECOMMENDS DISMISSAL of the instant petition, without prejudice to refiling. In accordance with Habeas Rule 4, the Court Clerk is directed to serve a copy of the instant petition and this Report by certified mail to the Respondent.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of after being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 15th day of January, 1997.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 16th Day of January, 1997.

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 16 1997

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER L. DAVIS aka CL Davis; MARVA DAVIS aka Marva L. Davis; TRIAD BANK, NA; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Osage County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

FILED
IN OPEN COURT
JAN 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95cv 970H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of January, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 24, 1996, pursuant to an Order of Sale dated July 1, 1996, of the following described property located in Osage County, Oklahoma:

Lot Two (2), Block Two (2), COUNTRY CLUB HEIGHTS, an Addition to Tulsa, Osage County, State of Oklahoma, according to the recorded Plat thereof.

a/k/a 1230 N. Olympia Ave. Tulsa, OK 74127

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Christopher L. Davis, Marva Davis, Triad Bank, NA, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer, Osage County, Oklahoma and Board of County Commissioners, Osage County

Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

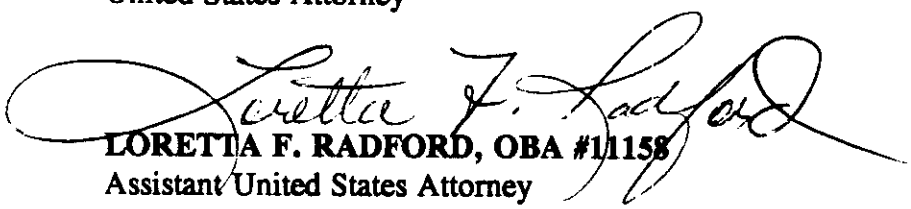
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95cv 970H

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 16th Day of January, 1997.

C. Lavelle, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY N. DURANT aka Jerry North Durant aka Jerry Durant; TRACY M. DURANT aka Tracy Marie Durant; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
IN OPEN COURT

JAN 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 16 1997

Civil Case No. 95cv 1120H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of January, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 25, 1996, pursuant to an Order of Sale dated July 1, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Fifteen (15), Block Three (3), HUNTERS RUN, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Jerry N. Durant, Tracy M. Durant, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer, Tulsa County Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, and to the

purchaser, Jarry M. Jones, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95cv 1120H

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 16th Day of January, 1997.

C. Fowler, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIE SUMMERALL, JR.; RETA KAY SUMMERALL; UNKNOWN OCCUPANTS; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

JAN 16 1997

FILED
IN OPEN COURT

JAN 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-CV 1000E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of January, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 25, 1996, pursuant to an Order of Sale dated June 26, 1996, of the following described property located in Tulsa County, Oklahoma:

> Lot Two (2), Block Ten (10), SUMMIT HEIGHTS ADDITION, to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail and to the Defendants, Willie Summerall, Jr., Reta Kay Summerall and Unknown Occupants of 4007 E. 15th St., and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

(23)

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

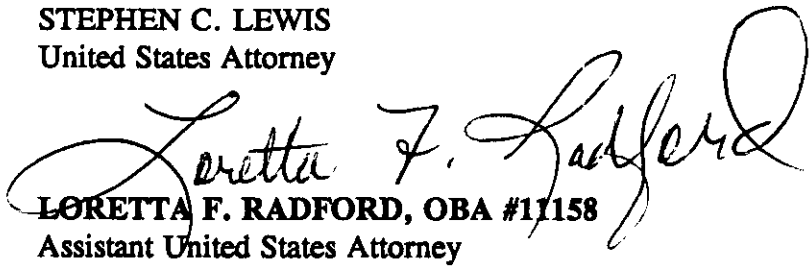
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-CV 1000E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN CRAIG BROWN aka Steve Brown; SHIRLEY A. WEDGE dba Port Ketchum Resort; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 95cv 1121E

FILED
IN OPEN COURT
JAN 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAN 16 1997

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of January, 1997 there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 28, 1996, pursuant to an Order of Sale dated July 8, 1996, of the following described property located in Tulsa County, Oklahoma:

> **Lot Fourteen (14), Block Nine (9), ARROW SPRINGS SECOND, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Shirley A. Wedge dba Port Ketchum Resort, City of Broken Arrow, Oklahoma, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail and to the

(24)

Defendant, Steven Craig Brown by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Ledger, a newspaper published and of general circulation in Broken Arrow, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

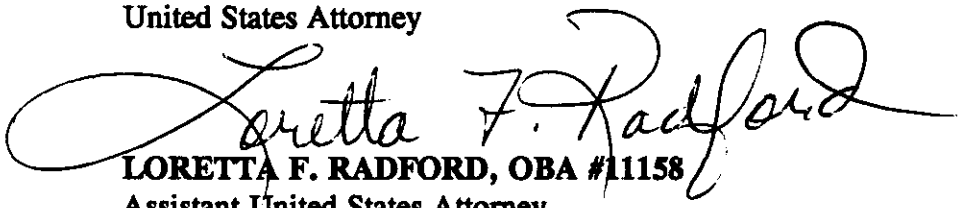
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95cv 1121E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT L. MORGAN aka ROBERT LEE MORGAN, SR.; KIMBERLY DAWN ROLAND fka KIMBERLY DAWN MORGAN aka KIMBERLY D. MORGAN; MISSOURI DEPARTMENT OF SOCIAL SERVICES; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

FILED
IN OPEN COURT
JAN 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
JAN 16 1997

Civil Case No. 95CV 936C

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of January, 1997 there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 22, 1996, pursuant to an Order of Sale dated June 14, 1996, of the following described property located in Rogers County, Oklahoma:

THE NORTH 208 FEET OF THE EAST 165 FEET OF THE W/2 OF THE NW/4 OF THE NW/4 OF THE SE/4 OF SECTION 32, TOWNSHIP 23 NORTH, RANGE 17 EAST OF THE I.B. & M., ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE U.S. GOVERNMENT SURVEY THEREOF.

(24)

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Kimberly Dawn Roland, Missouri Dept. Of Social Service, State of Oklahoma, ex rel. Department of Human Services, County Treasurer, Rogers County, Oklahoma and Board of County Commissioners, Rogers County, Oklahoma, by mail, and to the Defendant, Robert L. Morgan by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95CV 936C

FILED

JAN 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, ET AL,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 88-C-1645-E

ENTERED ON DOCKET

DATE JAN 16 1997

ORDER APPROVING TRUST EXPENSES

Pursuant to an oral application by Boatmen's Trust Company, Trustee of the Phillip Lee Hull Trust, the statement submitted by Stephen Adelson in the amount of $1,400 for services as directed by this Court is approved and payment thereof is directed.

The Court's prior oral approval of payment of $2,000 for the purchase of household curtains and the payment of $6,320.64 for computer hardware, installation and training in the use thereof is hereby memorialized.

DATED: 1/16/96

JAMES O. ELLISON
SENIOR JUDGE OF THE UNITED STATES
DISTRICT COURT

James E. Bishop, OBA #815
BRUMLEY & BISHOP
601 South Boulder Avenue, Suite 604
Tulsa, Oklahoma 74119-1306
(918) 582-0043

ATTORNEYS FOR BOATMEN'S TRUST COMPANY,
TRUSTEE OF THE PHILLIP LEE HULL TRUST

346

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDY SPODNICK,
SSN: 548-60-4453,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE 1/16/96

Case No. 93-CV-304-J

FILED

JAN 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Plaintiff's motion to reconsider this Court's October 9, 1996 Order. [Doc. No. 21]. With this previous Order, the Court held that the "lodestar" method would be applied to attorney fee determinations under 42 U.S.C. § 406(b). [Doc. No. 20]. The Court relied on the Tenth Circuit's decision in Hubbard v. Shalala, 12 F.3d 946 (10th Cir. 1993) to make this determination. Plaintiff has moved to reconsider, arguing that the Court has misapplied Hubbard and should adopt the "contingency fee" method.

The Court has reconsidered this issue in light of Plaintiff's most recent submissions and declines to adopt the "contingency fee" method for calculating attorney fees under § 406(b). The Court finds the "lodestar" method more consistent with Hubbard and § 406(b)'s statutory mandate. Plaintiff's motion to reconsider is, therefore, **DENIED.**

I. Introduction

Plaintiff applied for disability insurance benefits under Title II of the Social Security Act on June 5, 1991. The Commissioner denied benefits initially and at the administrative hearing level. Plaintiff appealed the Commissioner's denial of benefits to this Court. On August 31, 1994, this Court entered an Order reversing the Commissioner's disability determination and remanding the case for further consideration of Plaintiff's claim of illiteracy. [Doc. No. 10]. After the remand by this

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Court, the Commissioner granted Plaintiff benefits on December 25, 1995. The Commissioner awarded Plaintiff a lump sum of $54,063.50 as past-due benefits.[1/]

Plaintiff's attorney has moved for an award of attorney's fees pursuant to 42 U.S.C. § 406(b)(1)(A). [Doc. No. 16]. Plaintiff's attorney alleges he spent 23 hours litigating this case before this Court. Plaintiff's attorney is requesting a fee of $5,000.00 (i.e., approximately 9.25% of Plaintiff's past-due benefit award). The Commissioner objects to Plaintiff's request for fees. The Commissioner does not argue that the 23 hours spent by Plaintiff's attorney is not reasonable given the facts and circumstances of this case. Rather, the Commissioner argues that a fee of $5,000.00 is unreasonable because it would result in an hourly rate of $217.39.[2/]

Plaintiff executed a contingency fee contract with his attorney. Pursuant to this contract, Plaintiff agreed to pay his attorney 25% of any past-due benefits awarded. Twenty five percent of the past-due benefits awarded in this case would be $13,515.88. Plaintiff's attorney argues that the $5,000.00 fee he is now requesting is reasonable because it is less than the contingency fee amount agreed to by Plaintiff. Attached to Plaintiff's motion is an Affidavit by Plaintiff requesting that the Court approve his attorney's request for a fee of $5,000.00.

II. Discussion

Plaintiff's attorney relies on Wells v. Sullivan, 907 F.2d 367 (2nd Cir. 1990) and McGuire v. Sullivan, 873 F.2d 974 (7th Cir. 1989) for the proposition that attorney fees under § 406(b)(1)(A) should be controlled primarily by the freely-negotiated contingency fee contract between a social security claimant and his attorney. The Commissioner relies on Hubbard v. Shalala, 12 F.3d 946 (10th Cir. 1993) for the proposition that under § 406(b)(1)(A) a contingency fee determined pursuant to a contingency fee contract is not binding on the Court and the Court

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[1/] The term "past-due benefits" is not defined in Title II of the Social Security Act. It is, however, defined in the Commissioner's regulations as

> the total amount of benefits payable under title II of the Act to all beneficiaries that has accumulated because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made.

20 C.F.R. § 404.1703.

[2/] Nothing in § 406(b) defines the Commissioner's role with respect to the determination of fees to be awarded for work before the district court. Nevertheless, for a district court to make an informed decision, it is appropriate for the Commissioner to inform the court as to what in her judgment is an appropriate fee. Coup v. Heckler, 834 F.2d 313, 325 (3rd Cir. 1987); Cotter v. Bowen, 879 F.2d 359, 362 n. 4 (8th Cir. 1989); Frazier v. Sullivan, 768 F. Supp. 1511, 1514 n. 11 (M.D. Ala. 1991).

should use the "lodestar" method to calculate fees under § 406(b)(1)(A). The Court's research reveals a significant split of authority among the circuit courts of appeal. Despite this split of authority, the Court finds that the Tenth Circuit's opinion in Hubbard settles the question for this circuit.

The relevant portions of 42 U.S.C. § 406(b) provide as follows:

> (1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, **the court may determine and allow** as part of its judgment **a reasonable fee** for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.
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> . . .
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> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

42 U.S.C. § 406(b) (emphasis added). This statute places the inescapable burden on the Court to determine and allow a reasonable attorney fee. Krig v. Sullivan, 143 F.R.D. 270, 271 (N.D. Fla. 1992). Congress offers no guidance on how a court is to determine a reasonable fee. In particular, it is not clear how a court is to account for the existence of a contingency fee contract in determining what is a reasonable fee. Brown v. Sullivan, 917 F.2d 189, 192 (5th Cir. 1990); Frazier v. Sullivan, 768 F. Supp. 1511, 1514 (M.D. Ala. 1991). This is precisely the issue which has divided the circuit courts of appeal.

A minority of the circuits -- the Second, Sixth and Seventh -- have adopted what is referred to as the "contingency fee" method.[3/] If a contingency fee agreement exists, these circuits begin their determination of a reasonable fee under § 406(b)(1)(A) by looking to the amount stated in the contingency fee agreement. According to the Sixth circuit, the amount of the agreed on contingency fee is accorded presumptive weight, while in the Second and Seventh circuits the amount of the contingency fee is considered the "starting point." In these three circuits, a contingency fee may be adjusted downward where (1) there is improper conduct or ineffectiveness of counsel; and/or (2) counsel would enjoy a windfall due to either an inordinately large past-due benefit award or minimal effort by counsel.

A majority of the circuits -- the First, Third, Fourth, Fifth, Eighth and Ninth -- have adopted what is referred to as the "lodestar" method.[4/] These circuits calculate a reasonable fee by multiplying the reasonable number of hours by the reasonable market rate for similar services in the community in which the attorney practices. The product of reasonable hours times reasonable rate is referred to as the lodestar.[5/] These circuits then allow upward adjustments of the lodestar based on several factors. One of the factors considered is the existence of a contingency fee agreement.

The minority and majority approaches normally do not produce dramatically different results. The minority approach begins with the contingent fee amount and then adjusts downward. The majority approach begins with the lodestar and then adjusts upward. In more cases than not, calculation of a fee under either method would lead to a similar result. Cotter, 879 F.2d at 363. The Tenth Circuit has, however, adopted the majority/lodestar approach. See Hubbard v. Shalala, 12 F.3d 946 (10th Cir. 1993).

A. Hubbard v. Shalala

In Hubbard, plaintiff's attorney requested a fee which would have resulted in an hourly rate of $207.95. The district court refused to award a fee based on this hourly

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[3/] See Wells v. Sullivan, 907 F.2d 367 (2nd Cir. 1990); Rodriquez v. Bowen, 865 F.2d 739 (6th Cir. 1989) (*en banc*); and McGuire v. Sullivan, 873 F.2d 974 (7th Cir. 1989).

[4/] See Colon v. DHHS, 850 F.2d 24 (1st Cir. 1988); Coup v. Heckler, 834 F.2d 313 (3rd Cir. 1987); Craig v. DHHS, 864 F.2d 324 (4th Cir. 1989); Brown v. Sullivan, 917 F.2d 189 (5th Cir. 1990); Cotter v. Bowen, 879 F.2d 359 (8th Cir. 1989); Allen v. Shalala, 48 F.3d 456 (9th Cir. 1995). See also MacDonald & Williams, In Whose Interests? Evaluating Attorneys' Fee Awards and Contingency-Fee Agreements in Social Security Disability Benefits Cases 47 Admin. L. Rev. 115 (1995) (advocating use of the lodestar method until meaningful change in § 406(b)'s fee system can be achieved in Congress).

[5/] "Lodestar" is defined as "a star that leads or guides," or as "someone or something that serves as a guiding star or as a focus of hope or attention." Webster's Third New International Dictionary 1329 (1993).

rate and reduced the hourly rate to $150.00 per hour. Plaintiff's attorney appealed. On appeal, Plaintiff's attorney urged the Court to adopt the minority position as announced by the Sixth Circuit in Rodriquez and establish a "rebuttable presumption that an attorney in a Social Security Disability case would receive the full 25% contingency fee under contract . . . ." Hubbard, 12 F.3d at 948 (quoting from Appellant's Brief). The Tenth Circuit refused to adopt the minority position announced by the *en banc* court in Rodriquez. Instead, the Court endorsed the lodestar method that had been used by the district court. According to the Court, the lodestar amount "normally provides a 'reasonable' attorney fee." Hubbard, 12 F.3d at 948 (quoting from Blum v. Stenson, 465 U.S. 886, 897 (1984)).

Plaintiff first attempts to distinguish Hubbard by arguing that it is an isolated case applicable only in situations where an hourly rate is requested. Plaintiff argues that Hubbard does not apply to situations where the fee requested is based on a freely-negotiated contingency fee contract. To support this argument, Plaintiff attaches a copy of the fee motion which was filed in the district court in Hubbard and points out that there is no mention of a contingency fee agreement. The attorney in Hubbard was asking the district court for an enhanced hourly fee.[6/] Plaintiff argues that because the attorney in Hubbard was arguing for an hourly fee and not a fee based on a contingency fee agreement, Hubbard cannot apply to this case because Plaintiff's attorney in this case is requesting a fee based on the contingency fee agreement with his client. The Court does not agree.

It appears that the attorney in Hubbard relied on a contingency fee agreement before the Tenth Circuit. The Tenth Circuit clearly states in its opinion that the attorney in Hubbard urged the Court to adopt "a rebuttable presumption that an attorney in a Social Security Disability case would receive the full 25% contingency fee . . . ." Hubbard, 12 F.3d at 948 (quoting directly from the attorney's brief). The attorney in Hubbard directed the Court's attention to the Sixth Circuit's *en banc* decision in Rodriquez, which is premised on the existence of a contingency fee agreement. After reviewing the Rodriquez decision, the Tenth Circuit declined to adopt the contingency fee method and adopted the lodestar method. Id. The Court is not convinced, therefore, that Hubbard is an isolated case, applicable only when an hourly rate, and not a rate based on a contingency fee contract, is requested.

Plaintiff next attempts to distinguish Hubbard by arguing that the Court in Hubbard did not hold that the lodestar method was the exclusive method for determining fee awards. As support for this argument, Plaintiff cites Roberts v.

[6/] The motion in Hubbard asks for $150.00 per hour plus an additional sum of $57.95 per hour. The motion does not state why the attorney in that case believed he was entitled to an enhanced hourly rate. Thus, the Court has no way to determine what the attorney in Hubbard presented to the district court as a basis for enhancing the hourly rate.

Chater, 83-CV-1136-M (N.D. Okla., April 18, 1996). See also Tucker v. Shalala, 1994 WL 114842, *1 (D. Kan., March 22, 1994). The decisions in Roberts and Tucker provide support for the proposition that when a contingency fee agreement is present, the starting point for fee determinations under § 406(b) is the amount of the agreed upon contingency fee. Both of these courts distinguish Hubbard by holding that the Court in Hubbard did not hold that the lodestar method was the exclusive method for determining fee awards under § 406(b).

It is true that the Tenth Circuit in Hubbard did not state that the lodestar method was the "exclusive" method of calculating fees under § 406(b). The Court in Hubbard did hold, however, that the lodestar method is preferred over the contingency fee method. First, the Court declined to adopt the Sixth Circuit's decision to accord a contingency fee amount presumptive weight. Second, the Court stated that the lodestar method normally provides a reasonable attorney fee. Hubbard, 12 F.3d at 948. The Court is convinced, therefore, that the Tenth Circuit intends for the lodestar method to be applied to fee determinations under § 406(b).

The Plaintiff argues that the Tenth Circuit's opinion in Hubbard leaves room for a court to apply a contingency fee method that begins with the contingency fee amount, but does not afford that amount a rebuttable presumption as in Rodriquez. While this approach may not be explicitly rejected in Hubbard, the Tenth Circuit's heavy reliance on the lodestar method is a rejection by implication. Furthermore, the Court declines to adopt a method that has been rejected by six other circuits.[7/]

B. Majority Position

After weighing the views advanced by the majority of the courts of appeal, and after independently considering § 406(b)'s legislative history, the Court is persuaded that the lodestar method should be used to set fees under § 406(b). Initially, the Court finds the lodestar method more consistent with § 406(b)'s statutorily-mandated "reasonable fee." While the Court recognizes the virtues of contingency fee agreements, including the incentives they create for attorneys to represent indigent social security claimants, it cannot be denied that contingency fee agreements do not always produce a "reasonable" attorney fee. Brown, 917 F.2d at 192.

[7/] Coup, 834 F.2d at 313; Colon, 850 F.2d at 26; Craig, 864 F.2d at 326-28; Brown, 917 F.2d 190; Cotter, 879 F.2d at 362 (*dicta*); Allen, 48 F.3d 458-59. Neither Roberts nor Tucker dealt with or distinguished these authorities. The Court also finds the following district court opinions persuasive: Krig v. Sullivan, 143 F.R.D. 270 (N.D. Fla. 1991); and Frazier v. Sullivan, 768 F. Supp. 1511 (M.D. Ala. 1991) (both cases provide an in-depth analysis of § 406(b)). See also MacDonald & Williams, In Whose Interests? Evaluating Attorneys' Fee Awards and Contingency-Fee Agreements in Social Security Disability Benefits Cases 47 Admin. L. Rev. 115, 149 (1995) (recognizing that a majority of the courts, including the Tenth Circuit, have adopted the lodestar method and rejected the contingency fee method).

Section 406(b)'s scant legislative history supports use of the lodestar method. The Senate and Conference Report accompanying § 406(b) contains the following passages:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.
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> The committee bill would provide that whenever a court renders a judgment favorable to the claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . .

Senate Report No. 89-404, Pub. L. 88-97, reprinted in 1965 U.S.C.C.A.N. 1943.

Based on the Senate and Conference Report to § 406(b), it is fair to conclude that Congress was concerned primarily with burdensome contingency fee arrangements. To counter this perceived problem, Congress authorized the courts to determine and allow a "reasonable" attorney fee. Any fee determination method which would give strong deference to the contingency fee agreement between a social security claimant and his attorney appears to be inconsistent with Congress' intent.

Section 406(b) is a limit on the amount of fees an attorney can contract to receive from a social security claimant. Cotter, 879 F.2d at 360. Section 406(b) is a "statutory interference with the attorney client contractual relationship, which would otherwise be determined by the marketplace for legal services." Id. See also Coup, 834 F.2d at 324; Brown, 17 F.2d at 192. Under § 406(b), the criterion is not what the parties agreed, but what is reasonable. Brown, 917 F.2d at 192; Craig, 864 F.2d at 327. Section 406(b) authorizes the Court to "determine" and "allow" a "reasonable" attorney fee, not approve an agreed upon fee. Contingency fee contracts are not mentioned in § 406(b). Section 406(b)'s 25% cap simply prevents courts from dispersing fees which would disproportionately deplete a claimant's past-due benefits. Frazier v. Sullivan, 768 F. Supp. 1511, 1515 (M.D. Ala. 1991); Cotter, 879

F.2d at 363. For these reasons, fees remain subject to court approval even where, as in this case, the client expresses approval and satisfaction with the requested fee. Id.; Coup, 834 F.2d at 324; Colon, 850 F.2d at 26. There are several peculiar aspects of social security litigation that justify such *parens patriae* limitations on the right to contract freely. Allen, 48 F.3d at 458.

A social security claimant who is granted benefits is by definition disabled and unable to work. The past-due benefits from which attorney fees are awarded are provided for the support and maintenance of the social security claimant and his dependents. Colon, 850 F.2d at 26. These benefits are often inadequate to the task. The Court should, therefore, be vigilant in preventing too great a reduction of these benefits. Congress provided the Court with this responsibility and power by enacting § 406(b). Cotter, 879 F.2d at 365; Allen, 48 F.3d at 458-59; Frazier, 768 F. Supp. at 1516.

Many social security claimants have mental or other impairments that would often interfere with their ability to intelligently negotiate a fee contract with their attorney. In this case, Plaintiff's claim was reversed and remanded by this Court so that the Commissioner could reevaluate Plaintiff's illiteracy. The Court in no way suggests that there was overreaching by Plaintiff's attorney in this case. Nevertheless, when an illiterate social security claimant is involved, a court should be particularly hesitant to rely on a contingency fee arrangement, given concerns about an illiterate claimant's ability to understand the meaning of a contingency fee contract. See, e.g., Allen, 48 F.3d at 459 n. 4; Frazier, 768 F. Supp. at 1516; and Krig, 143 F.R.D. at 275 (recognizing these concerns).

In Krig Magistrate Judge Sherrill addressed the bargaining power of social security claimants with the following remarks:

> Wells, McGuire, and Rodriquez all are premised upon the flawed assumption that social security claimants have negotiating power in establishing fee agreements with attorneys who represent them. This assumption is essential to a rule that relies so heavily upon a contingency fee contract as the basis for determining the reasonableness of a fee. The problem is the relative poverty and ill health of most social security claimants. While not every claimant wins his or her case in this court, most appear to be suffering from some physical problems, most have little education, and most are not working. These persons uniformly have no ability to hire an attorney. They can obtain legal representation only if the attorney is willing to take the case without payment of a fee at the outset. A

> contingency fee contract of some sort is inevitable under these conditions. Also, while the numbers have been few, in every case before the undersigned where a contingent fee contract has been mentioned the fee was always 25% of past-due benefits. If true arm's length bargaining were operative, one would expect variations of the percentage. Accordingly, it must be concluded that there is very little arm's length bargaining in the establishment of 25% contingency fee contracts.

Krig, 143 F.R.D. at 275-76.

Use of the contingency method is more likely to reward fortuitous and purposeful delay. "[U]nlike with most other civil litigation, a more belated award of benefits to a social security claimant will advantage the attorney who receives a contingent fee -- even where the passage of time requires little or no extra legal work -- while of course harming the claimant himself." Frazier, 768 F. Supp. at 1517. The lodestar method compensates counsel only for work reasonably expended on the litigation. The lodestar method, therefore, neither encourages attorneys to cut corners nor to unnecessarily delay a case just to increase the past-due benefits award in hopes of obtaining a larger fee. Id.[8/]

The amount of recovery in a social security case is rarely impacted by the attorney's efforts.

> [C]ontingency fees do little to foster or reward more effective representation in social security cases. Although certain disability lawsuits may be riskier or more complex than others, generally the amount of recovery is -- unlike in personal injury cases, for example -- 'the subject of a calculation which is rarely in question and therefore, bears no relationship to the lawyer's skill, effort, or effectiveness.'

Frazier, 768 F. Supp. at 1517 (quoting In re Horenstein, 810 F.2d 73, 75 (6th Cir. 1986)). Under a contingency fee approach, fees in social security cases increase in direct proportion to the amount of delay in the case, not in proportion to the skill and work of the claimant's attorney. Krig, 143 F.R.D. at 276.

[8/] The Court is aware that the contingency fee method does allow for a downward reduction based on a showing of unnecessary delay by a claimant's attorney. The Court believes, however, that attempting to distinguish between delay caused by the normal administrative process and delay caused by a claimant's attorney creates problematic evidentiary issues at the fee determination stage of a case.

For all of the reasons discussed above, the Court is persuaded by the majority position and adopts the lodestar method for calculation of fees under 42 U.S.C. § 406(b)(1)(a).

C. Lodestar Calculation

1. Reasonable Hours

The Commissioner has not objected to the number of hours Plaintiff's attorney claims that he spent on this case. The Court has conducted an independent review of the pleadings in this case and has reviewed the billing records attached by Plaintiff's attorney. Plaintiff's attorney filed a 10 page brief, which raised three general errors by the ALJ. The brief demonstrates that some legal research was done. Based on all of this, the Court is satisfied that the 23 hours which Plaintiff's attorney spent on this case are reasonable.[9/] Plaintiff's attorney has spent additional time litigating the fee issues in this case. Plaintiff may supplement his original fee application to add the time spent on this case since the original application was filed.

2. Reasonable Rate

The starting point for determining a reasonable rate under the lodestar method is to ascertain the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience and reputation. In this case a reasonable rate will be the rate charged in the Northern District of Oklahoma by social security attorneys with the same skill, experience and reputation as Plaintiff's attorney.

Based on the evidentiary record before it, the Court is unable to determine the prevailing market rate for social security legal services in the Northern District of Oklahoma.

> [T]he burden is on the fee applicant to produce satisfactory evidence -- **in addition to the attorney's own affidavits** -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

9/ The Court notes that the novelty and difficulty of a case are often factors looked at to determine whether the hours requested by an attorney are reasonable. These factors are usually advanced as a justification for an unusually large number of hours. Frazier, 768 F. Supp. at 1519. Plaintiff's attorney has not advanced those factors and the Court finds that they are not applicable in this case.

Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984) (emphasis added). See also Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir. 1995) (discussing generally the calculation of a reasonable market rate under the lodestar method).

Plaintiff's attorney has produced no evidence of the prevailing market rate. In his brief in support of his motion to reconsider, Plaintiff's attorney does state the following:

> Should the Court not be persuaded by Plaintiff's argument, he responds to the Court's request for information regarding the prevailing market rate as that [sic] another attorney, Paul McTighe, in this city doing substantially the same work is charging $150.00 per hour.

[Doc. No. 21, p. 7]. Plaintiff's attorney's conclusory statement about Mr. McTighe's hourly rate is not "evidence." See Fed. R. Civ. P. 43(e). The prevailing market rate also cannot be resolved by stipulation. Under § 406(b) the Court, and not the parties, retains the ultimate responsibility for determining a reasonable fee. Evidence in addition to Plaintiff's attorney's own affidavit must be submitted. Blum, 465 U.S. at 895 n.11. The Court will set an evidentiary hearing to determine the prevailing market rate for social security legal services rendered in the Northern District of Oklahoma. See Section II(D), *infra* regarding the Court's expectations for the evidentiary hearing.

The following factors are applicable to determine a reasonable hourly rate: skill required; experience, reputation and ability of the particular lawyer; time limitations; preclusion of other work; undesirability of the case and the nature and length of the attorney's relationship with his client. See, e.g., Frazier, 768 F. Supp. at 1519-20 (for an application of these factors). The Court will examine each of these factors separately.

Skill Required: There is no evidence that this case involved unusually complex or difficult issues. Nevertheless, the skill required to provide adequate legal services in social security cases is fairly specialized. Attorney's practicing in this area must be familiar with the complex statutes, regulations, procedures and precedent peculiar to the social security arena. As a result, there are relatively few attorneys who routinely handle social security lawsuits in this district.

Experience, Reputation and Ability of Plaintiff's Attorney: Approximately 95% of Plaintiff's attorney's case load is in social security disability representation. Plaintiff's attorney has also effectively represented 100's of social security claimants in this district. Plaintiff's attorney also continues to train in this area. Plaintiff's attorney is, therefore, a specialist in this field. Given the skill required and Plaintiff's

attorney's experience, Plaintiff's attorney's hourly rate should be at the top of the range of prevailing market rates.

Time Limitations: Plaintiff's attorney has presented no evidence that this case was of such a priority that it interfered with his other legal work.

Preclusion of Other Employment: This factor relates to whether otherwise available business was foreclosed because (1) of conflicts created by taking the case; or (2) of the fact that once employment was undertaken, Plaintiff's attorney was unable to use that time to work on other matters. Plaintiff's attorney has presented no evidence that this factor is applicable here.

Undesirability of the Case: Plaintiff's attorney has presented no evidence that this case in particular or social security cases in general are undesirable.

a. Contingency Enhancement

Many courts adopting the lodestar method find that attorneys should not be limited to a bare-bones lodestar fee where a contingency fee agreement exists. Craig, 864 F.2d at 326. Limiting attorneys in contingent fee situations to hourly rates appropriate in non-contingent fee cases may discourage the bar from representing social security claimants. Coup, 834 F.2d at 325. Consequently, many courts adopting the lodestar method allow for an enhancement to the lodestar based on the contingent nature of the attorney's fee in a particular case. See Coup, 834 F.2d at 324; Craig, 864 F.2d at 327-28; Brown, 917 F.2d at 192-193; and Cotter, 879 F.2d at 362-63.

In Hubbard, the Tenth Circuit was asked and refused to find an agreed contingency fee to be rebuttably reasonable. Instead, the Tenth Circuit adopted the lodestar method to determine a reasonable fee. The Tenth Circuit did not address whether a contingency enhancement was permissible under the lodestar method. The court finds, therefore, that Hubbard does not address the propriety of granting an enhancement based on the contingent nature of an attorney's fee.

A relatively recent United States Supreme Court case raises concern as to whether a contingency fee enhancement to the lodestar is permissible. See City of Burlington v. Dague, ____ U.S. ____, 112 S. Ct. 2638 (1992). Prior to Dague, a majority of the United States Supreme Court held that in the fee-shifting context,[10/] the lodestar may be enhanced due to the contingency of payment. The Court's

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10/ Fee-shifting refers to those statutes requiring a court to determine and allow a reasonable attorney fee to be paid by a losing party to a prevailing party.

opinion was, however, badly fractured. A four-person plurality held that enhancements based on contingency were appropriate only in exceptional cases. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 726-29 (1987) (White, J., plurality opinion). Justice O'Connor provided the critical fifth vote for the judgment of the Court. She agreed with the plurality that a contingency fee enhancement was not appropriate in the case before the Court, but Justice O'Connor agreed with the four dissenting Justices that a contingency enhancement is not generally inappropriate. Five years after Delaware Valley, the Supreme Court addressed the issue again in Dague. In Dague, a majority of the Court (i.e., 6 to 3) held that enhancements to the lodestar, based on the contingent nature of payment, are not proper in the fee-shifting context. Id. at 2643-44.

The primary focus under a fee-shifting statute and under § 406(b) is the determination of a "reasonable" attorney fee. Dague, 112 S. Ct. at 2639, 2641. The respondent in Dague argued that a "reasonable" fee for attorneys "who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and consequent nonpayment." Id. Respondent argued that "[f]ee-shifting statutes should be construed . . . to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates." Id. The Supreme Court rejected this argument, finding that any enhancement for contingency "would likely duplicate in substantial part factors already subsumed in the lodestar." Id. Thus, a contingency enhancement was not necessary to arrive at a "reasonable" fee.

Section 406(b) instructs a court to "determine and allow as a part of its judgment a reasonable fee. . . ." To discharge its obligation in this case, the Court is forced to ask whether it is reasonable that an attorney that assumes the risk of nonpayment be paid more per hour than an attorney that assumes no risk of nonpayment? The answer to this question must be yes, unless Dague directs otherwise.

The Court finds that Dague does not direct otherwise. The Court in Dague considered a fee-shifting statute and nothing else. The Court's opinion makes repeated reference to the fee-shifting statute at issue. Generally, the Court objected to grafting a contingency enhancement onto the lodestar model because to do so would duplicate factors already taken into account by the lodestar method. Some of the Court's concerns apply only in the fee-shifting context and not in the § 406(b) context. Many of the concerns raised by the Court can be avoided by proper inquiry at a hearing to determine § 406(b) fees.

Since Dague, the Ninth Circuit is the only circuit to discuss whether Dague's holding applies to § 406(b). See Allen, 48 F.3d at 460. The court in Allen held that Dague was inapplicable to § 406(b) because

> § 406(b)(1) is not a fee-shifting statute. It strikes a balance between encouraging lawyers to represent disability claimants, and protecting the already inadequate stipend most claimants receive. There is nothing inconsistent with the scheme of § 406(b)(1) in allowing the court to consider the existence of a contingent fee arrangement as long as it balances that factor with the others we have identified.

Allen, 48 F.3d at 460.[11/]

The Allen court uses language from the Supreme Court's decision in Venegas v. Mitchell, 495 U.S. 82 (1992) to highlight an important difference between a fee-shifting statute and §406(b). A fee-shifting statute, like § 1988,

> differs both in language and in purpose from § 406(b)(1). As a fee-shifting statue, § 1988 does not attempt to regulate what prevailing parties must pay their attorneys. As the [Supreme Court] noted in Venegas, '§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer.' Id. Section 406(b)(1), on the other hand, speaks directly to what a plaintiff must pay his or her own lawyer.

Allen, 48 F.3d at 459. In fee-shifting cases, a court does not interfere with the attorney/client relationship. An attorney receives the full benefit of his contingency fee contract, no matter what a court determines is a "reasonable" fee under the applicable fee-shifting statute. Under § 406(b)(1), an attorney does not necessarily receive the full benefit of his fee contract because a court is directly involved in deciding what fee is reasonable for the client to pay to the lawyer. For this reason, a contingency enhancement is not needed to arrive at a "reasonable" fee in the fee-shifting context, but it is needed in the § 406(b) context.

While many courts have recognized that contingency fee enhancement is justified under the lodestar method, there is no clear guidance on how the amount of enhancement is to be determined. The Court in Craig notes that the primary

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[11/] But see Pudula-Holewinski v. DHHS, 1995 W.L. 798906, *4 (D.N.J. Nov. 6, 1995) where the court found that Dague's analysis applied to § 406(b) and refused to allow a contingency enhancement in a social security case.

consideration to take into account is the attorney's risk in receiving nothing for his services. Craig, 864 F.2d at 328. The Court in Allen held that courts cannot use the contingency factor to subsidize the claims of losing social security claimants. Allen, 48 F.3d 460. Allowing such a subsidization would be "'fundamentally unfair to the claimants who depend upon back benefit recoveries, [and would be] contrary to congressional intent to protect claimants by limiting fee awards.'" Id. (quoting Straw v. Bowen, 866 F.2d 1167, 1171 (9th Cir. 1989)).

The Court has determined that as a general matter, contingency fee enhancements are not inappropriate in social security cases. The Court will, however, set a hearing and hear argument as to whether such an enhancement is needed to provide Plaintiff's attorney with a reasonable fee in this case. The Court will also hear argument as to an appropriate method to calculate the amount of a contingency enhancement. See Section II(D), *infra* regarding the Court's expectations for the evidentiary hearing.

b. Delay Enhancement

There is often a significant delay between the time an attorney's services are rendered in a social security case and the time he is paid under § 406(b). Courts adopting the lodestar method recognize, therefore, that the lodestar should account for this delay. The reported decisions reviewed by this Court reveal two methods of accounting for this delay. Under the first method, the delay is accounted for by using the prevailing market rate at the time the fee application is filed, rather than the prevailing market rate at the time the services were actually rendered. Cotter, 879 F.2d at 364-65. Under the second method, an enhancement for delay is calculated using 28 U.S.C. § 1961. Craig, 864 F.2d at 328. Section 1961 deals with the calculation of interest on judgements. The court believes that the second method (i.e., a delay enhancement tied to an interest rate) most fairly compensates for any delay in payment. The Court will, however, set a hearing and hear argument as to an appropriate method to calculate the amount of a delay enhancement. See Section II(D), *infra* regarding the Court's expectations for the evidentiary hearing.

D. Evidentiary Hearing

The Court will set an evidentiary hearing for 1:30 p.m. on the 5th day of February 1997. The Court will hear oral argument and receive evidence regarding the following items:

1. Prevailing Market Rate -- Plaintiff is directed to present a witness in court who is familiar with the prevailing hourly rate in the Northern District of Oklahoma for legal services performed by lawyers in social security cases. Plaintiff shall also present evidence regarding the effect that a

contingency fee contract may have on the prevailing hourly rate. Defendant may also present any witnesses it deems appropriate on this subject.

2. Contingency Enhancement -- The parties are directed to present argument and any evidence they deem appropriate to establish whether or not a contingency enhancement to the lodestar is necessary in this case to achieve a reasonable fee. The parties are also directed to present argument regarding how a contingency enhancement, if appropriate, should be calculated.

3. Delay Enhancement -- The parties are directed to present argument regarding how a delay enhancement should be calculated.

4. Other Issues -- The Court recognizes that it may have addressed several issues in this Order, not specifically addressed in the parties' brief. The parties may, therefore, present any additional argument they deem appropriate.

CONCLUSION

Plaintiff's motion to reconsider is **DENIED** in so far as it asks this Court to endorse the contingency fee method. [Doc. No. 21]. The Court finds that 42 U.S.C. § 406(b) requires the Court to calculate a reasonable attorney fee to be paid to Plaintiff's attorney out of Plaintiff's past-due benefit award. The lodestar method will be used to calculate this reasonable fee. The lodestar will be calculated by multiplying the number of hours reasonably expended on this case by the prevailing market rate in the Northern District of Oklahoma for social security legal services by an attorney with Plaintiff's lawyer's skill, experience and reputation. The Court finds further that under § 406(b)(1) a delay enhancement to the lodestar is appropriate and that a contingency enhancements to the lodestar may be appropriate in certain cases. A hearing has been set to determine the prevailing market rate for social security work, the need for and amount of a contingency enhancement in this case, and the amount of a delay enhancement.

IT IS SO ORDERED.

Dated this 14 day of January 1997.

Sam A. Joyner
United States Magistrate Judge

FILED

JAN 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
vs.) CIVIL ACTION NO. 96CV1114K
)
RONALD GUIDRY,)
)
Defendant.)

ENTERED ON DOCKET
DATE 1-15-97

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $1,859.61, plus accrued interest of $397.55, plus administrative costs in the amount of $35.15, plus interest thereafter at the rate of 8% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation

of the defendant that Ronald Guidry will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 5th day of February, 1997, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $60.00, and a like sum on or before the 5th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Ronald Guidry, in the principal amount of $1,859.61, plus accrued interest in the amount of $397.55, plus interest at the rate of 8% until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney

Ronald Guidry

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 14 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANGEL ALEXANDER,

Plaintiff,

vs.

STATE BANK & TRUST, N.A., an Oklahoma corporation,

Defendant.

Case No. 96-C-286-BU

ENTERED ON DOCKET
JAN
DATE 1 5 1997

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 14th day of January, 1997.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

SBR

FILED

JAN 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESSIE D. MCNATTE,
Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner
of the Social Security Administration,
Defendant.

Case No.
95-C-892J

ENTERED ON DOCKET

DATE 1/15/97

DISMISSAL WITHOUT PREJUDICE

COMES NOW Jessie D. McNatte, Plaintiff in the above and entitled matter, and hereby dismisses his Social Security Appeal in this matter without prejudice.

Respectfully Submitted,

Gerald J. Lovoi

GERALD J. LOVOI
ATTORNEY AT LAW
324 South Main #900
Tulsa, Oklahoma 74103
(918) 622-0031
OBA #12137

CERTIFICATE OF MAILING

I, Gerald J.Lovoi, Attorney at Law, hereby certify that on the 14 day of January, 1997 I placed a true and correct copy of the above and foregong Dismissal into the United States Mails with sufficient pstage thereon fully prepaid, addressed to:

Wynn Dee Baker
Assistant U.S. Attorney
333 W. Fourth Street
Suite 3460
Tulsa, Oklahoma
74103-3809

Gerald J. Lovoi

GERALD J. LOVOI

12

CJ

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERIC BERMUDEZ,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner, Social Security Administration,

Defendant.

Civil Action No. 95-C-1237-W

ENTERED ON DOCKET

DATE 1/15/97

JUDGMENT

On the 12 day of January 1997, the case was remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89, 111 S.Ct. 2157 (1991). The Court hereby is divested of jurisdiction of this case.

THUS DONE AND SIGNED on this 15 day of January 1997.

JOHN LEO WAGNER
United States Magistrate Judge

14

FILED

JAN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERIC BERMUDEZ,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner, Social Security Administration,

Defendant.

Civil Action No. 95-C-1237-W

ENTERED ON DOCKET

DATE 1/15/97

ORDER

IT IS ORDERED, ADJUDGED and DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89, 111 S.Ct. 2157 (1991). The Court hereby is divested of jurisdiction of this case.

THUS DONE AND SIGNED on this 9th day of January 1997.

JOHN LEO WAGNER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AL YEAGER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-C-1045-E
	)	
PURINA BENEFIT ASSOCIATION LONG-TERM DISABILITY PLAN,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE JAN 14 1997

ORDER

Before the Court, pursuant to Fed. R. Civ. P. 56, is Defendant's, PURINA BENEFIT ASSOCIATION LONG-TERM DISABILITY PLAN ("PURINA"), motion for summary judgment (Docket 6). Defendant's motion is granted.

I. UNDISPUTED FACTS

Plaintiff, previously a salaried employee of Continental Baking Company ("CBC"), sustained a work-related injury on April 8, 1994. After receiving medical attention, he returned to work and continued performing his normal duties. On May 5, 1994, Plaintiff was suspended for a violation of company policy.[1] Plaintiff's suspension ended on May 13, 1994, when CBC terminated his employment.

On May 9, 1994, Plaintiff sought medical attention from his physician for the injury that he sustained on April 8, 1994. As a result of this examination, Plaintiff's physician prescribed a leave

[1]Plaintiff disputes that he ever violated company policy, but admits this is CBC's stated reason for terminating him.

(9)

of absence. After he was terminated, Plaintiff applied for benefits under CBC's long-term disability plan, which is administered by PURINA. On February 14, 1995, CBC denied Plaintiff's application.

II. ANALYSIS

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In determining whether summary judgment is appropriate, the Court must view the evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). However, "[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Although a plan beneficiary is usually required to exhaust administrative remedies before proceeding to court, the parties agree that it is appropriate for the Court to resolve their dispute. To resolve this dispute, the Court's analysis begins, and ends, with the question of whether Plaintiff is entitled to benefits under the plan.

The determination of whether Plaintiff is entitled to benefits is governed by the terms of the plan itself. Straub v. Western Union Tel. Co., 851 F.2d 1262, 1265-66 (10th Cir. 1988). Terms in the PURINA plan indicate that long-term disability benefits are available when "a Covered Employee, while covered under this Plan, became Totally Disabled and remained so Totally Disabled during the Qualifying Disability Period . . . ." Def. Mot. For Summ. J., Exhibit B, p.5, § 3.1. The term "'Qualifying Disability Period' means 180 consecutive days of continuous Total Disability." Id.

at pp. 2-3, § 1.15. However, an employee's coverage terminates when he ceases to work as a regular employee.[2]

Viewing the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff did not become eligible for benefits under the plan. Plaintiff's coverage under the plan ended on May 13, 1994, when CBC terminated his employment. As his coverage terminated, Plaintiff can not meet the plan's eligibility requirements. For entitlement to benefits, Plaintiff must have been disabled during the 180 day Qualifying Disability Period, while covered under the plan. Consequently, the Court holds that Plaintiff is not entitled to the long-term disability benefits he seeks. As this determination is dispositive of the current dispute, it is unnecessary to reach the other arguments the parties presented.

III. CONCLUSION

ACCORDINGLY, IT IS ORDERED that PURINA BENEFIT ASSOCIATION LONG-TERM DISABILITY PLAN's, motion for summary judgment (Docket 6) is **granted**.

SO ORDERED THIS 8th day of January, 1996.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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[2]The plan states: "The coverage of each Covered Employee shall terminate automatically on the earliest of the following dates . . . . the date the Covered Employee ceases to perform work as a regular employee other than as a result of Total Disability or is not on authorized leave of absence status in accordance with established practices . . . ." Def. Mot. For Summ. J., Exhibit B, p.4, § 2.3(a).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AL YEAGER,

Plaintiff,

vs.

PURINA BENEFIT ASSOCIATION LONG-TERM DISABILITY PLAN,

Defendant.

No. 95-C-1045-E

ENTERED ON DOCKET
DATE JAN 14 1997

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Purina Benefit Association Long-Term Disability Plan, and against the Plaintiff, Al Yeager. Plaintiff shall take nothing of its claim.

DATED THIS 8TH DAY OF JANUARY, 1997.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

(10)

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JAN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANGEL MARTINEZ SUAREZ,

Petitioner,

vs.

KEN KLINGER,

Respondent.

Case No. 96-C-926-BU

ENTERED ON DOCKET
DATE 01-14-97

ORDER

This matter comes before the Court upon Petitioner's Motion to Withdraw Habeas Corpus and to Dismiss Without Prejudice. Upon due consideration of Petitioner's motion, the Court finds the same should be granted.

Accordingly, Plaintiff's Motion to Withdraw Habeas Corpus and to Dismiss Without Prejudice (Docket Entry #5) is **GRANTED**. This action is **DISMISSED WITHOUT PREJUDICE**. In light of the Court's ruling, Respondent's Motion to Dismiss for Failure to Exhaust State Remedies is **DECLARED MOOT** (Docket Entry #3).

ENTERED this 13th day of January, 1997.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 1-14-97

RICK VARNER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 95-C-925K
	)	
HAWKEYE EAGLE TRANSPORTATION EQUIPMENT CO., INC., INTERNATIONAL HARVESTER COMPANY; CROSS MANUFACTURING, INC.; PERMCO, INC., a registered trade name; GOYAN MACHINERY COMPANY; CORPORATION 'X'; JOHN DOE CORPORATION; COMPANY 'X'; and JOHN DOE COMPANY,	)	
	)	
Defendants.	)	

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL.

On this 10 day of ~~December~~ January, 1996, the above styled and numbered cause came on for hearing before the Honorable Terry C. Kern, upon the Stipulation for Dismissal of the Plaintiff and Defendants.

The Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that this action should be dismissed without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby dismissed without prejudice to refiling.

Terry C Kern

HONORABLE TERRY C. KERN
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

GLENDA H. ISOKARIARI,

Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner of the Social
Security Administration,

Defendant.

Case No: 93-C-960-W

ENTERED ON DOCKET
DATE 1/14/97

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #20) and Defendant's Response to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Court Costs (Docket #23).

On August 9, 1996, the court entered an order, pursuant to the direction of the Tenth Circuit Court of Appeals, remanding this case to the agency to allow the ALJ to give his reasons for disregarding the opinions of claimant's treating physicians regarding her moderately severe sciatica and the level of her depression, and to complete a psychiatric review technique form and discuss the evidence he relied on in completing it, should he choose to do so without the assistance of a medical advisor, or obtain such a review by a medical advisor (Docket #18). Plaintiff now seeks attorney fees in the amount of $3,890.77.

The Equal Access to Justice Act ("EAJA") established an entitlement to fees and costs for parties prevailing in actions against agencies of the United States

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government, unless the court finds that the government's position "was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); Goatcher v. Chater, 57 F.3d 980, 981 (10th Cir. 1995). The Supreme Court has found that the term "substantially justified" does not mean justified to a high degree, but rather "has been said to be satisfied if there is a 'genuine dispute' . . . or 'if reasonable people could differ as to [the appropriateness of the contested action]." Pierce v. Underwood, 487 U.S. 552, 565 (1988). (citations omitted). The Court held that it could be "substantially justified" if it was justified for the most part, that is, if it has a reasonable basis in law and fact. Id.

The court finds that the government's position can be substantially justified. The case turned on a subjective evaluation of the medical evidence, which itself contained conflicting reports.[1] The court's decision in this case is not meant to

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[1/] This court found as follows in its Order of July 10, 1995:

> There is no merit to claimant's first contention that the ALJ committed reversible error in failing to consider all the medical evidence, particularly Dr. Moore's report of July 31, 1992, in which he diagnosed claimant's moderate sciatica and prescribed Parafon Forte, and the reports from Associated Centers for Therapy, Inc. While the ALJ did not specifically discuss these reports, he stated that he examined "the entire record" (TR 20). He recognized that she indeed did suffer from back pain and depression, but her complaints were exaggerated (TR 19). There is nothing in Dr. Moore's report which suggested claimant could not work. In fact, he stated he could find no specific abnormalities on her lumbar spine x-rays (TR 223). The records from Associated Centers for Therapy, Inc. did not mention an inability to work, and showed claimant reported doing better after receiving medication (TR 243). She admitted the therapy was helpful and the Prozac helped her sleep six hours a night (TR 43, 54).

The ALJ was not required to "refute" these reports, but rather to weigh all the evidence in reaching his conclusions. While great weight must be given to the opinion of a treating physician, the determination of the nature and severity of an impairment must be supported by medically acceptable clinical and laboratory diagnostic techniques and should be consistent with the substantial evidence in the record. Tillery, 713 F.2d at 603-604.

There is also no merit to claimant's second contention that the ALJ's assessment of claimant's residual functional capacity was not supported by substantial evidence. The requirements of medium work set out in 20 C.F.R. § 404.1567(c) include lifting no more than fifty pounds occasionally and carrying weights up to twenty-five pounds frequently. The RFC evaluations done by Dr. Woodcock and Dr. Fiegel conclude that she can do such work. While claimant testified that her back starts to hurt after she sits for thirty minutes (TR 57), the ALJ noted that she sat throughout the hearing with no complaint (TR 19). The hearing lasted sixty-six minutes (TR 34, 79). Claimant admitted she can lift 32 pounds without pain, cares for two small children, and does all the housework, laundry, and shopping (TR 45-49, 58). She admitted that her past work required lifting or carrying only ten pounds on a frequent basis and that ten pounds was the heaviest weight lifted (TR 113). At her intake session at the social security office on January 16, 1991, it was noted that she had no difficulty walking, sitting, or using her hands (TR 115). There is substantial evidence to support the ALJ's assessment of claimant's RFC.

The Tenth Circuit found as follows in its decision of June 4, 1996:

Claimant first argues that the ALJ incorrectly ignored an opinion of Dr. Moore, a treating physician, that she suffers from moderately severe sciatica for which he prescribed the prescription pain-killer, Parafon Forte. . . .

In his decision, the ALJ refers only to claimant's diagnosis of back strain. He does not mention Dr. Moore's diagnosis of moderately severe sciatica, much less give any reasons for disregarding it. Such omission is error.

In addition to being error in its own right, the ALJ's failure to deal with Dr. Moore's diagnosis of moderately severe sciatica makes it impossible

suggest that in any case where the district court affirms an ALJ's decision and is reversed by the Tenth Circuit, this court will find that the government's position was reasonable and therefore substantially justified and deny fees under EAJA. The ALJ and district court may err at times as to the law or rely on minimal evidence and be reversed by the Circuit. In such cases, the government's position must properly be found not substantially justified and fees awarded to plaintiff's counsel. The Tenth

---

> for us to review the ALJ's credibility determination. The ALJ found claimant not to be credible because he believed her subjective testimony of depression and pain to be "exaggerated, and out of proportion to the medical evidence of record which suggests that the claimant experienced only a slight sprain injury to her right leg and lower back." R.Vol. II at 19. We are left to wonder what effect consideration of a diagnosis of moderately severe sciatica might have had on this credibility determination, but we cannot resolve that question because the ALJ did not document why he disregarded the evidence of sciatica.
>
> Claimant's second point of error relates to a second instance in which the ALJ disregarded an opinion from one of claimant's treating physicians. In his discussion of claimant's mental problems, the ALJ noted that claimant suffers from only minimal depression. Id. at 18. This opinion is from the reports of two of the agency's consultative physicians. See id. at 149, 201. Claimant, however, was also treated at the Associated Centers for Therapy from July 1992 through January 1993 for her mental and emotional problems. The records from that treating source indicate that claimant suffers from major depression. Id. at 245. Again, as with the evidence of the sciatica, the ALJ did not discuss the opinion of this treating physician and why he chose to rely, instead, on the opinions of the consultative examiners. As with the evidence of the sciatica, failure to consider evidence of major depression also may have affected the ALJ's credibility determination.

It is clear that in this case different appellate courts reached different conclusions based on conflicting evidence and reasonable minds could differ as to the appropriateness of the ALJ's position.

Circuit has clearly taken the position that "'the United States is not shown to have been substantially justified merely because the government prevailed before the tribunal below and endeavored to uphold the decision in its favor. If that were the rule, attorney's fees never could be awarded in favor of an appellant against the government.'" Weakley v. Bowen, 803 F.2d 575, 579 (10th Cir. 1986) (citing Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1392 (Fed. Cir. 1982)).

There is no merit to defendant's claim that "she is not aware that the Tenth Circuit has authorized payment of EAJA fees in this case" and "that issue is for the determination of the Circuit Court." (Defendant's Response, Docket #23, pg. 3). In Goatcher, 57 F.3d at 981, the Tenth Circuit clearly found that:

> [I]n a suit challenging the denial of social security disability benefits, it is a judgment reversing and remanding a case to the Secretary for additional proceedings under sentence four of 42 U.S.C. §405(g) that makes a plaintiff a prevailing party for purposes of the EAJA . . . . It is clear from reading the entirety of § 405(g) that the "court" referred to in sentence four is the district court. Consequently, it will be the district court's order remanding this case to the Secretary that will constitute a "sentence four remand" and make appellant a prevailing party under the EAJA. (emphasis in original).

This court finds that defendant's position was substantially justified and that plaintiff is not entitled to reasonable attorney's fees pursuant to § 2412(a) and (b).

Dated this 9th day of January, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE

WILLIAM R. KELLEY, aka
WILLIAM ROBERT KELLEY,
and CAROL JO KELLEY,

Debtors.

THE EMPLOYERS WORKERS'
COMPENSATION ASSOCIATION,
an Unincorporated Group Self-Insurance
Association,

Appellant,

v.

BILL KELLEY, an individual, d/b/a
BILL KELLEY & ASSOCIATES,

Appellee.

FILED
JAN 9 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 96-CV-499-H

ENTERED ON DOCKET
DATE JAN 13 1997

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #6) and Appellee's Objection to the Report and Recommendations (Docket #7).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the

Magistrate Judge. The Bankruptcy Court's dismissal of the adversary proceeding is hereby reversed and the case is hereby remanded to the Bankruptcy Court for further proceedings.

IT IS SO ORDERED.

This 9TH day of January, 1997.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 1 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HOUSSAM ELSOUEISSI, an individual)
)
Plaintiff,)
)
vs.) Case No. 96-CV-0832-H
)
DENNY'S, INC., a California corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 13 1997

JUDGMENT

This Court entered an Order on November 26, 1996, which granted Defendant's Motion For Default against Plaintiff for Plaintiff's failure to respond to Defendant's Motion To Dismiss, ordered that Defendant's Motion To Dismiss be deemed confessed pursuant to Local Rule 7.1(C), and dismissed Plaintiff's claims against Defendant with prejudice.

On December 5, 1996, Plaintiff's Motion For Relief From An Order, Application To Amend Complaint And Brief In Support was filed, asking the Court to vacate the dismissal pursuant to Rule 60(b). This Court entered an Order on December 9, 1996, denying Plaintiff's Motion For Relief From An Order, Application To Amend Complaint And Brief In Support.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered, dismissing Plaintiff's claims against Defendant with prejudice.

IT IS SO ORDERED.

This 10TH day of JANUARY, 1997.

The Honorable Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
Plaintiff,)
vs) CIVIL NO. 96-C-819-K
WILLIAM R. MILLER,)
Defendant.)

ENTERED ON DOCKET
DATE 1-13-97

PAYMENT AGREEMENT

Plaintiff, the United States of America, having obtained its judgment herein, and the defendant, having consented to this Payment Agreement, hereby agree as follows:

1. Plaintiff's consent to this Payment Agreement is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that he will willingly and truly honor and comply with the Payment Agreement entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 16th day of January, 1997, the defendant shall tender to the United States a check or money order payable to the "U. S. Department of Justice", in the amount of $300.00 and a like sum on or before the 16th day of each following month until the entire amount of the Judgment, together with costs and accrued post judgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney's Office, Debt Collection Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U. S. Rule, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. §1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth in (b) above.

(e) The defendant shall provide the United States with current, accurate evidence of his assets, income and expenditures (including, but not limited to, his Federal income tax returns) within fifteen (15) days of the date of a request for such evidence by the United States Attorney.

2. Default under the terms of this Payment Agreement will entitle the United States to execute on the judgment without notice to the defendant.

3. The defendant has the right of prepayment of this debt without penalty.

4. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or,

should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

United States District Judge

APPROVED AS TO FORM:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant U. S. Attorney
Attorney for Plaintiff

WILLIAM R. MILLER, Debtor

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORAL ROBERTS UNIVERSITY,
an Oklahoma corporation,

Plaintiff,

v.

TRAVIS ANDERSON, an individual, and
METROPLEX PROPERTIES, L.L.C., a
Colorado limited liability company,

Defendants.

Case No. 95-CV-583-H

ENTERED ON DOCKET
DATE JAN 13 1997

JUDGMENT

This Court entered an order on January 8, 1997 granting Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion for Summary Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants.

IT IS SO ORDERED.

This 10TH day of January, 1997.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRED NOURI,

Plaintiff,

v.

NATIONAL HOME INSURANCE COMPANY, a Colorado corporation, and HOME BUYERS WARRANTY CORPORATION, a Colorado corporation,

Defendants.

Case No. 96-CV-937-H

ENTERED ON DOCKET

DATE JAN 13 1997

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 10TH day of JANUARY, 1997.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC., et. al.,	)	
Plaintiffs,	)	
vs.	)	**Case No: 85-C-437-E**
THE HISSOM MEMORIAL CENTER, et. al.,	)	
Defendants.	)	

ENTERED ON DOCKET
DATE JAN 13 1997

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on December 10, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of $48,091.25 and out of pocket expenses in the amount of $4,149.55.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, for attorney fees in the amount of $48,091.25 plus expenses in the amount of $4,149.55 and a judgment in the amount of $52,240.80 is hereby entered on this day. The contested time on

Michele T. Gehres will be held in abeyance pending a conference with the parties on the 13 day of January, 1997 at 10:30 a.m.

ORDERED this 10th day of January, 1997.

HONORABLE JAMES O. ELLISON
United States District Court

Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
125 South Ninth Street, Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS

Mark Jones
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, OK 73105-3498
(405) 521-4274

Lynn S. Rambo-Jones
Deputy General Counsel
OKLAHOMA HEALTH CARE AUTHORITY
4545 N. Lincoln Blvd., Suite 124
Oklahoma City, Oklahoma 73105
(405) 530-3439

ATTORNEYS FOR DEFENDANTS

(ORDER37.FEE)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

G. BRYANT BOYD, individually, and as surviving spouse, personal representative and administrator of the Estate of Catherine Anne Boyd, deceased,

Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a foreign insurance company,

Defendant.

No. 96-C-542-B

ENTERED ON DOCKET
JAN 13 1997

ORDER

Before the Court is the Motion to Dismiss filed by the defendant, John Hancock Mutual Life Insurance Company ("John Hancock") (Docket No. 16). John Hancock moves to dismiss all tort claims asserted on behalf of the deceased, Catherine Ann Boyd, as barred by the statute of limitations. In addition, John Hancock moves to dismiss the negligent infliction of emotional distress claim asserted by Plaintiff G. Bryant Boyd ("Boyd") individually, and on behalf of the deceased, for failure to state a claim under Oklahoma law.

Boyd filed his original petition against John Hancock in the District Court of Tulsa County on June 14, 1995 asserting claims of breach of contract and breach of the implied covenant of good faith and fair dealing. The case was removed to this Court on June 14, 1996 based on diversity jurisdiction. On October 28, 1996, pursuant to Boyd's application, the Court granted leave to file an Amended Complaint. The Amended Complaint added Boyd in his capacity as surviving spouse,

(29)

personal representative and administrator of the Estate of Catherine Ann Boyd and added claims for negligent and intentional infliction of emotional distress and fraud and deceit.

John Hancock first argues that all tort claims brought on behalf of Catherine Ann Boyd are barred by the two year statute of limitations, 12 Okla. Stat. § 95(3), as she died on June 7, 1994 and Boyd's application to amend the complaint was not filed until October 4, 1996. John Hancock takes the position that Fed.R.Civ.P. 15(c) does not allow these claims to relate back to the filing of the original petition because the amendment adds a new plaintiff in an existing action. The Court disagrees.

Although Rule 15(c) does not explicitly address amendments which add or substitute plaintiffs, the conditions applicable to amendments adding or substituting defendants are adopted by analogy. Advisory Committee Notes to the 1966 Amendment to the Rule ("the attitude taken in Revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."). Therefore, an amendment to add/substitute new plaintiffs relates back to the filing of the original petition if defendant were on notice of the claim. *Ambraziunas v. Bank of Boulder*, 846 F.Supp. 1459 (D. Colo. 1994); *Neufeld v. Neufeld*, 910 F.Supp. 977, 985 (S.D.N.Y. 1996), citing *Employees Sav. Plan of Mobil Oil Corp. v. Vickery*, 99 F.R.D. 138, 143 (S.D.N.Y. 1983) ("[a]s long as a defendant has received notice of the action, and is prepared to defend against it, 'his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense '"); 6A Wright, Miller & Kane, Federal Practice and Procedure §1501 at 154-160; Annotation, Amendment of Pleading to Add, Substitute, or Change Capacity of, Party Plaintiff as Relating Back to Date of Original Pleading, Under Rule 15(c) of Federal Rules of Civil Procedure, so as to Avoid Bar of Limitations, 12 A.L.R. Fed. 233 (1972 and

Supp. 1996). A lack of prejudice to defendant is most apparent in cases in which the amendment simply changes the capacity of the plaintiff. In such cases, most courts conclude that the amendment relates back to the filing of the original petition under Rule 15(c) as long as the amendment is within the ambit of the same transaction, conduct or occurrence set forth in the original pleading. *Rivera v. U.S.*, 761 F.Supp. 126 (D. Fla. 1991) (granting plaintiff/personal representative's Rule 60(b) motion to reopen judgment and amend complaint to add damage claim on behalf of decedent's minor son, which was inadvertently omitted); *Stoppelman v. Owens*, 580 F.Supp. 944 (D. D.C. 1983); *Williams v. U.S.*, 405 F.2d 234 (5th Cir. 1968) (mother who sued as next friend of her minor son allowed to assert a claim on her own behalf after the statute of limitations had run as government on notice that parent's claim was also involved). The change in capacity after the statute of limitations has run is not significant because the amendment in "no way alters the know facts and issues on which the action is based." *Staren v. American Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1263 (7th Cir. 1976).

Although John Hancock seeks dismissal of all tort claims brought on Catherine Boyd's behalf, the only claim which arguably would be barred by the statute of limitations here is the bad faith breach of insurance contract claim.[1] However, it is clear that John Hancock had notice from the original petition that a claim on behalf of Catherine Boyd was also involved. Catherine Boyd was the dependent on the policy for whom the hospice services were sought from defendant and it is the denial of the claim for such services which forms the basis of the bad faith claim. The only difference,

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[1] According to Boyd, the fraud/deceit and negligent/intentional infliction of emotional distress claims added in the Amended Complaint are based on John Hancock's concealing the existence of a second insurance policy, which was not discovered by Boyd until June 1996. Thus, a fact question precludes dismissal based on statute of limitations for these claims. The Court, however, finds below that Boyd's claim for negligent infliction of emotional distress should be dismissed under Rule 12(b)(6).

in effect, between the pre- and post- amended bad faith claim is the additional damages incurred by Catherine Boyd. Yet, "[a]s long as the original complaint gives the defendant adequate notice, an amendment relating back is proper even if it exposes defendants to greater damages." *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litigation*, 815 F.Supp. 620, 644 (S.D.N.Y. 1993); *Shinkle v. Union City Body Co.*, 94 F.R.D. 631, 638 (D. Kan. 1982) ("We agree with those courts that permit a plaintiff to change the capacity in which an action is brought when there is no change in the parties before the court and all parties are on notice of the facts out of which the claim arose."); Wright, Miller & Kane, *supra* §1501 at 162. Accordingly, the Court finds that Boyd's bad faith breach of insurance contract claim brought on behalf of Catherine Boyd arises from the same transaction, occurrence or conduct as that brought on his own behalf and, therefore, relates back to the date of filing of the original petition. Having been on notice of the claim prior to the expiration of the statute of limitations, John Hancock can claim no prejudice effected from the additional capacity in which Boyd bring his claim of bad faith breach in the Amended Complaint..

John Hancock also seeks dismissal of Boyd's negligent infliction of emotional distress claim, brought individually and on behalf of his deceased wife, because Oklahoma does not recognize the claim absent tangible physical injury. The Court agrees that Boyd cannot state a claim for negligent infliction of emotion distress based solely on mental and emotional distress. *Slaton v. Vansickle*, 872 P.2d 929 (Okla. 1993). Boyd relies on *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 916 P.2d 241 (Okla. 1996). However, *Kraszewski* reiterates the holding in *Slaton* "that a plaintiff may recover on a claim for physical injury if it is accompanied by mental stress or when mental distress is accompanied by physical injury if the negligent act created a breach of duty to the party." *Id.* at 246. In either case, there must be a physical injury. Boyd alleges none here; therefore, the

Court dismisses the claim for negligent infliction of emotional distress under Rule 12(b)(6).

Accordingly, the Court denies defendant's motion to dismiss the amended complaint in part and grants it in part.

ORDERED this 10th day of January, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORA J. BLANKENSHIP, an Individual, and JOYCE BASS, an Individual,

Plaintiffs,

vs.

DOUBLETREE HOTELS, a Delaware corporation; TRAVELERS INSURANCE COMPANY, a Connecticut corporation, METROPOLITAN INSURANCE COMPANY, a Delaware corporation, and MONTGOMERY ELEVATOR COMPANY, a Delaware corporation,

Defendants.

Case No. 96-CV-492-B

ENTERED ON DOCKET
JAN 13 1997

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration on this 13th day of Jan., 1997, upon the Application and Stipulation of the Plaintiffs and the Defendant Travelers Insurance Company for an Order dismissing this case with prejudice as to the Defendant Travelers Insurance Company only. The Court, having reviewed the Application and Stipulation of the parties hereby and by these presents enters an Order dismissing the claims of the Plaintiffs against Travelers Insurance Company only, with prejudice.

Be it therefore, **ORDERED, ADJUDGED** and **DECREED** that the claims of the Plaintiffs, ORA J. BLANKENSHIP, an Individual, and JOYCE BASS, an Individual, against the Defendant, TRAVELERS INSURANCE COMPANY, a Connecticut corporation, be and are hereby dismissed with prejudice.

JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
for Thomas R. Brett

(42)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHARLES E. CRABTREE,

Petitioner,

vs.

TULSA COUNTY DISTRICT COURT,

Respondent.

Case No. 96-CV-687-B

ENTERED ON DOCKET
JAN 13 1997

ORDER

The Court has for consideration Petitioner Charles E. Crabtree's ("Petitioner") application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Docket # 4), as well as, various related motions (Docket ## 9, 11, 12, 13, 14). Respondent Tulsa County District Court ("State") has filed a response to the application for a Writ of Habeas Corpus and Petitioner has replied. After careful review of the record and applicable legal authorities, the Court hereby **DISMISSES WITHOUT PREJUDICE** Petitioner's application for a Writ of Habeas Corpus. Petitioner's related motions are hereby rendered **MOOT**.

Background

On October 3, 1995, Petitioner was charged in Tulsa County District Court with Rape in the First Degree, two counts of Forcible Sodomy, three counts of Lewd Molestation, all after former conviction of a felony. The following day, Petitioner appeared before Special Judge Pete Messler and entered a plea of not guilty after being informed of the charges against him. Judge Messler set Petitioner's preliminary hearing for November 9, 1995. After Petitioner completed a pauper's affidavit, the Tulsa County Public Defender was appointed to represent him. After a series of continuances, Petitioner's preliminary hearing was held on December 4, 1995 before Special Judge

(13)

Richard Clarke. Petitioner was bound over for trial on two counts of Sexual Abuse of a Minor Child and bond was set at $50,000.00 on each count.

On December 6, 1995, the public defender filed a motion to quash. On January 30, 1996, Petitioner was formally arraigned before District Judge B.R. Beasley after his motion to quash was heard and overruled. Jury trial was set for May 6, 1996. After multiple continuances at the State's request, the trial is now set for March 10, 1997.

Analysis

In his application for a Writ of Habeas Corpus, Petitioner raises a multitude of complaints surrounding the State court proceedings against him. The Court is of the opinion the only cognizable claim raised by Petitioner is a claim for violation of the right to a speedy trial. Petitioner states he has appealed an adverse ruling on this claim to the highest State court having jurisdiction. *See* Application for a Writ of Habeas Corpus, Docket # 4, p. 9, § 34 (f). However, a review of the information provided by Petitioner shows the only "appeal" taken was to the Tulsa County District Court. Despite Petitioner's contrary assertions, this Court is not convinced the right to a speedy trial claim has ever been presented to and ruled on by the Tulsa County District Court, much less the Oklahoma Court of Criminal Appeals.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. *See* Picard v. Connor, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and

correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

In the instant case, Petitioner has not exhausted his state remedies as to his claim of violation of right to a speedy trial. Therefore, this action must be **DISMISSED WITHOUT PREJUDICE** to it being reasserted after Petitioner has fully exhausted his state remedies by presenting said claim to the Oklahoma Court of Criminal Appeals. Petitioner's related motions (Docket ## 9, 11, 12, 13, 14) are **MOOT**.

IT IS SO ORDERED this 10th day of Jan, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT
JAN 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONALD HADDOX,

Plaintiff,

vs.

WAL-MART STORES INC., a Delaware corporation,

Defendant.

No. 96-C-207-K

ENTERED ON DOCKET
DATE 1-13-97

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment by Defendant Wal-Mart Stores, Inc., against Plaintiff Donald Haddox. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED THIS 10th DAY OF JANUARY, 1997.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT
JAN 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONALD HADDOX,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware corporation,

Defendant.

Case No. 96-C-207-K

ENTERED ON DOCKET
DATE 1-13-97

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff alleges that he entered defendant's business location at 1500 South Lynn Riggs Boulevard in Claremore, Oklahoma, on November 20, 1994, when he "slipped and fell on a freshly mopped area which was negligently allowed to remain unmarked or posted with a warning sign or marker." Defendant contends plaintiff has failed to establish a prima facie case of negligence.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971

F.2d 492, 494 (10th Cir. 1992).

The parties agree that it was raining on the day of the accident. Plaintiff entered defendant's establishment, wiped his feet on a rug inside the entryway, went through a second door, wiped his feet on a second rug, stepped off the rug, took three steps and fell. A prima facie case of negligence requires a showing of (1) a duty by the defendant to protect the plaintiff from injury, (2) a failure properly to exercise or perform that duty and (3) the plaintiff's injuries proximately caused by the defendant's breach. Jackson v. Jones, 907 P.2d 1067, 1071-72 (Okla.1995)(footnote omitted). A business owner owes a duty to its invitees or customers to exercise ordinary care to keep aisles and other parts of the premises used by invitees in transacting business in a reasonably safe condition. Brown v. Wal-Mart Stores, Inc., 11 F.3d 1559, 1563 (10th Cir.1993).

Defendant places principal reliance upon Safeway Stores, Inc., v. Criner, 380 P.2d 712 (Okla.1963), in which the Supreme Court of Oklahoma held that a store owner is not liable for the accidents of invitees when they fall on rainwater tracked into a store, absent actual or constructive notice to store employees of the condition. Plaintiff responds that Criner is based on "archaic social policy" and its "principle is no longer valid" (Plaintiff's response at 21). Plaintiff points to Wal-Mart employee handbooks and manuals, which describe certain duties on the part of Wal-Mart "people greeters" (i.e., employees who greet customers upon the customers' entrance into the store). These duties include placing "safety

cones" near the entrance during rainy or snowy weather, placing a "caution wet floor" sign on the door at eye level during rainy or snowy weather, and placing "caution wet floor" signs on the floor in a clearly visible place if it is raining. Plaintiff testified he saw no such cones or signs on the day in question. Essentially, plaintiff argues Wal-Mart's own policies modify the common law duty described in Criner.

Plaintiff has cited no authority for this proposition. Oklahoma law governs the issue of negligence in this diversity case. The highest court of the state has spoken in Criner and the decision has never been overruled or modified by that court. In any event, the general rule appears to be that "[w]hether a legal duty exists is a question of law and is determined by reference to whether the parties stood in such a relationship to each other that the law imposes an obligation on one to act for the protection of the other. Where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines." Rhodes v. Illinois Central Gulf Railroad, 665 N.E.2d 1260, 1272 (Ill.1996). See also Fillpot v. Midway Airlines, Inc., 633 N.E.2d 237 (Ill.App.1994)(where airline owed no legal duty to remove snow or ice, airline's policy manual requiring the clearing of walkways did not create such a duty).

Further, plaintiff has not pointed to evidence in the record that there was in fact water on the floor at the time plaintiff fell. Necessarily, no showing has been made that water had been standing for a sufficient period of time to put the defendant on

notice of a dangerous condition. Summary judgment is appropriate under the controlling Criner decision.

It is the Order of the Court that the motion of the defendant for summary judgment (#12) is hereby GRANTED.

ORDERED this 10th day of January, 1997.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE